92-1328

Supreme Court
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No.

In The Supreme Court of the United States

October Term 1992

HARVEY GORDON,

Petitioner,

v.

STATE OF FLORIDA, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the requirement of § *768.73(2)(b)* of the *Florida Statutes* that 60% of any award for punitive damages rendered in favor of an injured tort claimant be made payable to either the State General Revenue Fund or the Public Medical Assistance Trust Fund amount to a taking of private property without just compensation in violation of the Taking Clause of the Fifth Amendment, where the award results exclusively from the injured tort claimant's time, effort, and expense in the litigation process without any assistance whatever from the State?

2. Does the requirement of § *768.73(2)(b)* of the *Florida Statutes* that 60% of any award for punitive damages rendered in favor of an injured tort claimant be made payable to either the State General Revenue Fund or the Public Medical Assistance Trust Fund, thereby placing the burden of payment on the party who suffered the wrong rather than on the wrongdoer, violate the Excessive Fines Clause of the Eighth Amendment?

3. Does the requirement of § *768.73(2)(b)* of the *Florida Statutes* that 60% of any award for punitive damages rendered in favor of an injured tort claimant be made payable to either the State General Revenue Fund or the Public Medical Assistance Trust Fund amount to a deprivation of the claimant's property without substantive due process in violation of the Fourteenth Amendment?

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OPINIONS BELOW

The Final Judgment of the Florida Circuit Court, Dade County, was originally entered on July 27, 1989 (A-1). On October 9, 1990, the Circuit Court entered an

Order Amending Final Judgment (A-3). The first opinion of the Florida District Court of Appeal for the Third District rendered in this matter was filed on August 7, 1990 (A-6) and has been officially reported at *K-Mart Corp. v. Gordon*, 565 So.2d 834 (Fla. 3d DCA 1990). The second opinion of the Florida District Court of Appeal for the Third District was filed on August 27, 1991 (A-8) and has been officially reported at *Gordon v. State*, 585 So.2d 1033 (Fla. 3d DCA 1991). The decision of the Florida Supreme Court was rendered on November 12, 1992. It appears in the Appendix at (A-19) and has not yet been officially reported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1257(a)*. The final disposition of this case below is the Florida Supreme Court's November 12, 1992 per curiam decision (A-19) determining that § *768.73(2)(b)* of the *Florida Statutes* is constitutional and approving the August 27, 1991 decision of the Florida District Court of Appeal for the Third District (A-22).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

> nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> nor shall any State deprive any person of life, liberty, or property, without due process of law.

Section 768.73 of the *Florida Statutes*, at all times relevant to the instant case, provided as follows:

> (1)(a) In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty that involves willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.
>
> (b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant shall be entitled

to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

(c) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) In any civil action, an award of punitive damages shall be payable as follows:

(a) Forty percent of the award shall be payable to the claimant.

(b) If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

(3) In the event that the full amount of punitive damages awarded cannot be collected, the claimant and the other recipient designated pursuant to paragraph (2)(b) shall each be entitled to a proportional share of the punitive damages collected.

(4) Claimant's attorney's fees, if payable from the judgment, shall, to the extent that they are based on the punitive damages, be calculated based only on the portion of the judgment payable to the claimant as provided in subsection (2). Nothing herein shall be interpreted as limiting the payment of attorney's fees based upon the award of damages other than punitive damages.

(5) The jury shall not be instructed, nor shall it be informed, as to the provisions of this section.

STATEMENT OF THE CASE

This case presents the paradigm example of a state getting something for nothing. The State took the greater share of the punitive damages awarded to Harvey Gordon, an abused tort claimant, without even paying so much of its fair share of litigation costs and attorney's fees.

Mr. Gordon was falsely imprisoned and battered by employees of K-Mart Corporation in an incident occurring in one of K-Mart's stores on February 16, 1987. On July 25, 1989, a jury returned a verdict in Gordon's favor on his claims for negligent retention and supervision, false imprisonment, and battery. The jury awarded $72,500 in compensatory damages and $512,000 in punitive damages. On July 27, 1989, the Florida Circuit Court, Dade County, entered a Final Judgment for a total of $584,500 solely in Gordon's favor (A-1). Subsequently, on August 7, 1990, this Judgment was affirmed in its entirety by the Florida

District Court of Appeal for the Third District, in *K-Mart Corp. v. Gordon*, 565 So.2d 834 (Fla. 3d DCA 1990) (A-6 to A-7).

The State of Florida took no part in either prosecuting Gordon's claims against K-Mart and its employees or in defending the Judgment on appeal.[1]

After the mandate was issued on September 19, 1990, K-Mart, on September 20, 1990, moved to amend the Final Judgment to comply with *Fla. Stat. Ann.* § *768.73(2)(b)* (A-27). Thereafter, on October 4, 1990, the State of Florida moved to intervene to "assert its rights" under *F.S.A.* § *768.73(2)(b)* (A-31). That section, which is part of the Florida Tort Reform and Insurance Act of 1986, 1986 *Fla. Laws* ch. 86-160, § 52, became effective on July 1, 1986, *id.* § 70, and provided at all times relevant to the case at bar as follows:

> If the cause of action was based on personal injury or wrongful death, 60 percent of the [punitive damages] award shall be payable to the Public Medical Assistance Trust Fund created in § 409.2662; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

On October 9, 1990, the trial court granted the motions of K-Mart and the State of Florida (A-34) and entered an Order Amending Final Judgment, *nunc pro tunc* (A-3). The Order reduced Gordon's July 27, 1989

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[1]In fact, the State of Florida, upon K-Mart's complaint, criminally prosecuted Mr. Gordon for Retail Theft/Shoplifting. Mr. Gordon was acquitted of such alleged crime.

Final Judgment from a total of $584,500 down to $277,300. (A-4). The Order further entered a judgment in favor of the General Revenue Fund of the State of Florida in the amount of $307,200, "which sum represents sixty (60) percent of the punitive damage award" (A-4). While the District Court of Appeal upheld the trial court's Order in *Gordon v. State*, 585 So.2d 1033 (Fla. 3d DCA 1991) (A-8), it certified to the Florida Supreme Court "that this case involves a question of great public importance as to the constitutionality of § *768.73(2)(b)*" *Id.* at 1038 n.13 (A-18).

On appeal to the Florida Supreme Court,[2] Gordon raised a number of arguments attacking the constitutionality of *F.S.A.* § *768.73(2)(b)*, including that this section amounted to an unconstitutional "taking" of Gordon's property in violation of the Fifth Amendment (A-54, to A-57), that it violated the Eighth Amendment's Excessive Fines Clause (A-58, 61-63), and that it deprived Gordon of property without substantive due process in violation of the Federal Constitution (A-54-55, 56, 57, 59, 61). The Florida Supreme Court, in a per curiam opinion, concluded that "no substantive due process violation occurred" (A-20), adopting the reasoning of the District Court of Appeal in *Gordon v. State, supra*, 585 So.2d at 1035 (A-11), that Gordon had "no cognizable, protectable property right to the recovery of punitive damages at

[2]Gordon raised general objections to the constitutionality of § 768.73(2)(b) before the trial court (A-38, 42, 43). In his briefs filed with the district court, he attacked the statute as violating the Fifth (A-50, 51), Eighth (A-47, 51) and Fourteenth Amendments (A-51).

all" (A-20). The Court further reasoned that § *768.73(2)(b)* bore a rational relationship to two "legitimate legislative objectives: [1] to allot to the public weal a portion of damages designed to deter future harm to the public and [2] to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney" (A-21).

While the Florida Supreme Court did not specifically address Gordon's Fifth and Eighth Amendment claims, it did state that "[w]e have considered the other constitutional claims" and indicated that it had rejected all such claims (A-21). The Florida Supreme Court accordingly determined that § *768.73(2)(b)* was constitutional and approved the decision of the District Court of Appeal (A-22).

Justice Shaw of the Florida Supreme Court filed a dissenting opinion, concluding that § *768.73(2)(b)* effected an unconstitutional taking of Gordon's property without just compensation (A-22-25).

REASONS WHY THE PETITION SHOULD BE GRANTED

This Petition raises several weighty and precedential questions of federal constitutional law concerning the constitutionality of Florida's punitive damages "sharing" statute, *F.S.A.* § *768.73(2)(b)*, which at all times pertinent to this action required an injured Florida tort claimant to pay to the state 60% of any award for punitive damages recovered by him in a civil

tort action.[3] That these questions are of great public importance can be seen from the fact that, aside from Florida, at least seven other states have enacted similar statutes permitting their treasuries or agencies to grab sizeable portions of punitive damages awards rendered in various types of private litigation.[4] Jurists in still other states have advocated recognizing an inherent judicial power to compel the payment of a portion of a punitive damages award either to the state general fund

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[3]Effective April 8, 1992, *F.S.A.* § 768.73(2)(b) was amended to reduce the share of punitive damages payable to the state from 60% to 35%. 1992 *Fla. Laws* ch. 92-85, § 2. This amendment applies solely to those "pending cases and causes of action *in which a judgment has not been entered*," *id.* § 4 (emphasis added), and thus does not apply to this case in which a judgment was entered on July 27, 1989.

[4]*See Colo. Rev. Stat.* § 13-21-102(4) (requiring one-third of any punitive damages collected to be paid into the state general fund); *Ga. Code Ann.* § 51-12-5.1(e)(2) (requiring 75% of any punitive damages collected, less a proportionate part of the costs of litigation including reasonable attorney's fees, to be paid into the state treasury); *Ill. Rev. Stat.* ch. 110, ¶ 2-1207 (authorizing trial court, in its discretion, to apportion punitive damages award among the plaintiff, the plaintiff's attorney and the state department of rehabilitative services); *Iowa Code Ann.* § 668A.1(2)(b) (requiring distribution of 75% of punitive damage award to civil reparation tort fund); *Mo. Ann. Stat.* § 537.675 (providing that 50% of any final judgment awarding punitive damages, after the deduction of attorney's fees and expenses, shall be deemed rendered in favor of the state); *Or. Rev. Stat.* § 18.540(1)(c) (allocating, after attorney's fees are paid, one half of punitive damages award to criminal injuries compensation account); *Utah Code Ann.* § 78-18-1(3) (requiring 50% of the amount of punitive damages awarded and paid in excess of $20,000, after payment of attorney's fees and costs, to be deposited in state general fund).

or to some special fund that serves a public purpose or advances the cause of justice.[5]

THE 60% TAKING IS A VIOLATION OF THE FIFTH AMENDMENT.

Section 768.73(2)(b) violates the Taking Clause of the Fifth Amendment. The first question presented by the Petition is whether § *768.73(2)(b)* effected a taking of Gordon's property without just compensation in violation of the Fifth Amendment's Taking Clause, which has long been held to apply to the states through the Fourteenth Amendment. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 122 (1978); *Chicago, Burlington, & Quincy Railroad v. City of Chicago*, 166 U.S. 226, 239 (1897). The decision of the Florida Supreme Court on this issue is in direct conflict with *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), wherein the Colorado Supreme Court struck down as violative of the federal taking clause the requirement of *Colo. Rev. Stat.* § 13-21-102(4) that one third of a punitive damages award be paid into the state general fund.[6]

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[5]*See Fuller v. Preferred Risk Life Insurance Co.*, 577 So.2d 878, 887 (Ala. 1991) (Shores, J., concurring specially); *Hilgedick v. Koehring Finance Corp.*, ___ Cal. App. 3d ___, 8 Cal. Rptr. 76, 99 (1992) (Peterson, A.J., concurring in the result).

[6]On the other hand, the Florida Supreme Court's decision is in accord with the holding of the Iowa Supreme Court in *Shepard Components, Inc. v. Brice Petrides-Donohue & Associates, Inc.*, 473 N.W.2d 612 (Iowa 1991), that the application of *Iowa Code Ann.* § 668A.1(2)(b) to require, in certain specified circumstances, the distribution of 75% of a punitive damages award to the state civil reparation trust fund did not effect an unconstitutional taking of property in violation of the federal Constitution.

The taking clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. at 122; *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In determining whether a "taking" has occurred, this Court has considered the totality of circumstances underlying the governmental interference with private property rights, including the character of the governmental action, its economic impact, and its interference with the reasonable economic expectations of the property owner. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

The Florida courts essentially concluded that Gordon did not have any protectable property interest in the recovery of an award of punitive damages due to the undoubted power of the state to restrict or even to abolish the recovery of punitive damages before a claim for such damages has been reduced to judgment, *see Ross v. Gore*, 48 So.2d 412, 414 (Fla. 1950), and that, consequently, no taking of private property (or substantive due process violation) occurred. This is not a case, however, where the State of Florida has, by statute or judicial pronouncement, abolished or even restricted the recovery of awards of punitive damages in civil actions for intentional torts, such as false imprisonment and battery. The State of Florida continues to permit claimants in such civil actions to recover awards of punitive damages in unrestricted amounts.

Rather, the State in this case has sought, by statute, to declare that a lion's share of what would otherwise be the sole private property of the injured tort claimant, i.e., a recovered civil judgment or award for punitive damages, is payable to the State General Revenue Fund. *F.S.A.* § *768.73(2)(b)*. Under the terms of the statute as it existed at all times relevant to the instant case, the State of Florida was neither made a party to the litigation nor was it granted the status of a judgment creditor (A-37, 41, 42).[7] Moreover, under both federal law and the law of Florida, a person who is not a party to an action may not be made a party to a judgment entered in that action. *Illinois Surety Co. v. United States*, 240 U.S. 214, 226-27 (1916); *Warshaw-Seattle, Inc. v. Clark*, 85 So.2d 623, 625-26 (Fla. 1955). The State therefore had no interest in Gordon's claim for punitive damages, or in the litigation itself, at any time before a judgment or enforceable award for punitive damages was recovered by Gordon (A-41).[8]

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[7]While the Florida Legislature recently amended § 768.73 to direct that "[i]n the final judgment the court shall order the percentages of the award, payable as provided in subsection (2)," 1992 *Fla. Laws* ch. 92-85, § 2 (to be codified at *F.S.A.* § 768.73(3)), this amendment does not apply to the instant case. *See* 1992 *Fla. Laws* ch. 92-85, § 4.

[8]While the term "award" as used in § 768.73 is nowhere defined by statute, it has generally been held that an "award" means a judgment, sentence, or final decision. *E.g., Higginbotham v. State*, 20 Ala. App. 159, 101 So. 166 (1924); *Brantley v. ADH Building Contractors, Inc.*, 215 So.2d 297, 299 (Fla. 1968); *State ex rel. Engle v. Industrial Commission*, 142 Ohio St. 425, 52 N.E.2d 743, 747 (1944). Moreover, at least two states have recently interpreted the term "award" as used in their respective Tort Reform Acts as meaning "a remedy recoverable in accordance with an order for judgment," *Lira v. Davis*, 832 P.2d 240, 245 (Colo.

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Indeed, the State did not move to assert its right to payment of a portion of the punitive damages award until *after* a judgment for the full amount of the punitive damages assessed by the jury had been entered by the circuit court, that judgment had been affirmed in its entirety by the district court, and the district court's Mandate had issued. As Justice Shaw correctly concluded, "Mr. Gordon had a vested property right by the time the State intervened to claim its lion's share of the punitive damage award" (A-23). *See McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898); *Blocker v. Ferguson*, 47 So.2d 694, 698 (Fla. 1950).

Because Gordon's judgment entitled him as a judgment creditor to a satisfaction out of the real and personal property of the judgment debtor, the State's taking of 60% of that judgment was substantially equivalent to the taking of money itself. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court struck down, as violating the Fifth Amendment's Taking Clause, a Florida Statute, *F.S.A.* § *28.33*, authorizing a county to take the interest earned on an interpleader fund while deposited in the registry of the county court, where another statute imposed a

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1992), and *Tucker v. Marcus*, 142 Wis. 2d 425, 418 N.W.2d 818, 823 (1988), as distinguished from the amount of damages initially ascertained or determined by the jury.

Thus, as an "award" for purposes of § 768.73 is either a judgment or tantamount to a judgment, Gordon obtained a protected property interest upon the circuit court's entry on July 27, 1989 of a judgment for the full amount of the punitive damages assessed by the jury. The State's interest in receiving payment of a portion of the award did not arise under the statute until after a final judgment had been entered.

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fee for the clerk's services in receiving the fund into the registry. The Court reasoned that the State had not merely adjusted the benefits and burdens of economic life to promote the common good, but had exacted "a forced contribution to general governmental revenues ... not reasonably related to the costs of using the courts." *Id.* at 163. In other words, the Court ruled that "a State, by *ipse dixit*, may not transform private property into public property without just compensation," since "[t]his is the very kind of thing that the Taking Clause was meant to prevent." *Id.* at 164.

Once again, the State of Florida, by statute, is attempting to transform private property, i.e., a recovered judgment for punitive damages, into public property by directing that more than half of the judgment be paid into the state's coffers. Once again, the State, far from placing legitimate restrictions on the beneficial use and exploitation of private property or imposing a valid user fee measured as a small percentage of the award, *see United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989) (upholding, as not effecting an unconstitutional taking a federal statute requiring the Federal Reserve Bank of New York to deduct 1½% from the first $5 million dollars of an arbitration award entered by the Iran-United States Claims Tribunal), is acting to confiscate most of the award as a forced contribution to general governmental revenues "in a manner and to a degree not reasonably related to the cost of using the courts." *Kirk v. Denver Publishing Co., supra*, 818 P.2d at 271.

The forced sharing of the award with the State cannot be justified as the imposition of a valid fine or

forfeiture. As Justice Shaw pointed out (A-24), no demonstrable nexus exists between, on the one hand, any alleged governmental interest in punishing K-Mart's wrongful conduct and, on the other, the statutory imposition of a forced contribution on Gordon, the person injured by the wrongful conduct. *Id.* at 273; *cf. Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In other words, placing the burden of payment on the judgment creditor who suffered the wrong bears no rational relationship to any arguable goal of punishing the wrongdoer or deterring others from engaging in similar conduct. *Kirk v. Denver Publishing Co., supra*, 818 P.2d at 270; *cf. Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 83-84 (1988), upholding a Mississippi statute imposing a 15% penalty on a party who unsuccessfully appeals a money judgment as sufficiently related to the state's interest in discouraging frivolous appeals to survive a federal equal protection attack.

Nor has the State of Florida, in return for its forced exaction of most of Gordon's Judgment, given Gordon as the injured judgment creditor any benefit or service not furnished to other civil litigants not required to make the same contribution. *Kirk v. Denver Publishing Co., supra*, 818 P.2d at 272. As Justice Shaw observed, "[t]he State did nothing to earn its sixty-percent share of the punitive damage award" (A-24). The Judgment entered by the Circuit Court on July 27, 1989 resulted "exclusively from the judgment creditor's time, effort, and expense in the litigation process without any assistance from the state." *Id.* The State was not even required to pay for its proportionate share of the attorney's fees and costs expended by Mr.

Gordon in recovering the judgment. *See F.S.A. § 768.73(4).*

In view of these circumstances, Gordon had a reasonable economic expectation to receive the fruits of the entire judgment, which cannot be interfered with by the State to the degree attempted here without the payment of just compensation. The Court should therefore grant the Petition to resolve the split of authority among the various state supreme courts and remedy Florida's unconstitutional taking of the majority of Gordon's judgment in violation of the Fifth Amendment.

THE EIGHTH AMENDMENT IS VIOLATED WHEN THE STATE FINES, SEIZES AND EXTORTS 60% OF THE PUNITIVE DAMAGES AWARD.

Section 768.73(2)(b) violates the Excessive Fines Clause of the Eighth Amendment. The Petition further raises a grave constitutional issue as to whether *F.S.A. § 768.73(2)(b)* violates the Execssive Fines Clause of the Eighth Amendment by exacting a forced contribution to the General Revenue Fund of the State of Florida of 60% of Gordon's punitive damages judgment, even though Gordon was the plaintiff who suffered the wrong and not the wrongdoer. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court held that the Excessive Fines Clause of the Eighth Amendment does not apply to awards of punitive damages in civil cases between private parties "when the government neither has prosecuted the action *nor has any right to*

receive a share of the damages awarded." *Id.* at 264 (emphasis added). The Court expressly reserved decision on the question as to whether the excessive fines clause prohibits a state from using "the civil courts *to extract large payments or forfeitures for the purposes of raising revenue* or disabling some individual." *Id.* at 275 (emphasis added).

The question so reserved is squarely presented by the instant Petition. By giving the State of Florida a right to receive a share of the punitive damages awarded Gordon, *F.S.A.* § *768.73(2)(b)* implicates the Excessive Fines Clause of the Federal Constitution as contemplated in *Browning-Ferris. McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1578 (M.D. Ga. 1990) (*Ga. Code Ann.* § 51-12-5.1(e)(2), holds that by granting the State of Georgia the status of a nonparty judgment creditor entitled to 75% of any award of product liability punitive damages, the statute violated state and federal constitutional prohibitions as to excessive fines. In effect, the State of Florida is using the civil courts to extract large payments and fines or forfeitures from innocent plaintiffs such as Gordon. Even according "substantial deference" to the Florida legislature's judgment concerning appropriate sanctions for the conduct at issue here, the total non-gravity of Gordon's conduct, as the person who suffered the wrong rather than the wrongdoer, does not in any way justify the extreme harshness of the State's extraction of a fine or penalty in the amount of 60% of Gordon's judgment for punitive damages. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., supra*, 492 U.S. at 301 (O'Connor, J., concurring in part and dissenting in part); *cf. Solem v. Helm*, 463 U.S. 277, 290-92 (1983). Consequently, the

Petition should be granted to halt the State of Florida from continuing to extract for the benefit of its treasury "excessive monetary sanctions," *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., supra*, 492 U.S. at 275, from innocent tort claimants who have done nothing more heinous than use the State's civil courts to recover punitive damages judgments against proven wrongdoers.

FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAUSE HAS BEEN VIOLATED.

Section 768.73(2)(b) deprived Mr. Gordon of his property without substantive Due Process in violation of the Fourteenth Amendment. This Petition presents an important question as to whether § *768.73(2)(b)* violates federal substantive Due Process. The statute may only survive a substantive Due Process attack if its provisions are reasonably related to a proper legislative purpose. *Nebbia v. New York*, 291 U.S. 502, 537 (1934). Allowing the State to confiscate a large share of the punitive damages recovered by an injured tort claimant does not rationally promote the State's asserted interest in deterring future harm to the public. The wrongdoer is not to any greater degree deterred by such a forced division of the punitive damages award, since with or without such division the wrongdoer pays the same amount of punitive damages. Indeed, the deterrent effect of punitive damages is actually undermined to some degree by *the State's action in taking part of the award* in that the wrongdoer, in conjunction with all other taxpayers and residents of the State, will benefit from the forced distribution of a large portion of the award to the State treasury.

Nor is the statute rationally related to the goal of discouraging punitive damages by making them "less remunerative to the claimant and the claimant's attorney" (A-21). As already mentioned above, the statute in no way restricts the amount of punitive damages that may be recovered by a claimant, such as Gordon, on an intentional tort claim. Rather, the effect of the statute is merely to require that the claimant *pay* a large portion of what he recovers to the state. Thus, far from discouraging large punitive damages awards, the statute will inevitably have the effect of encouraging claimants and their attorneys to seek the recovery of punitive damages in the maximum amount possible in order to offset or mitigate the effect of having to divide such awards with the State. The statute further aggravates this tendency by intentionally shielding the jury from any knowledge that a portion of the award must be paid to the State. *See F.S.A. § 768.73(5).*

As the Florida courts erroneously concluded that the Florida punitive damages statute is rationally related to a legitimate state goal, the Petition should be granted to invalidate § *768.73(2)(b)* as violative of substantive Due Process.

CONCLUSION

In view of the reasons and authorities set forth above, Petitioner Harvey Gordon urges this Court to issue a Writ of Certiorari, invalidate as unconstitutional the Florida punitive damages sharing statute, *F.S.A. § 768.73(b)(2)*, and remand this matter to the Florida Supreme Court with directions to reinstate the trial court's Final Judgement of July 27, 1989.

Respectfully submitted,

Bernard B. Weksler
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February 5, 1993

92-1328

Supreme Court, U.S.
FILED
FEB 8 1993
OFFICE OF THE CLERK

No.

In The Supreme Court of the United States

October Term 1992

HARVEY GORDON,

Petitioner,

v.

STATE OF FLORIDA, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX

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IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 87-44067 (CA 10)
87-54731 (CA 10)

HARVEY GORDON,

Plaintiff,

vs.

K-MART CORPORATION, DAVID SPARROCK,
and PETER MIRAMBEAU,

Defendants.

FINAL JUDGMENT

Pursuant to the Verdict rendered in this action on July 25, 1989,

IT IS ORDERED AND ADJUDGED:

1. That Plaintiff, HARVEY GORDON, recover from Defendants, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, jointly and severally, the sum of SEVENTY-TWO THOUSAND FIVE HUNDRED ($72,500.00) Dollars, with costs that shall bear interest at the rate of 12% a year for which let execution issue.

2. That Plaintiff, HARVEY GORDON, also recover from the Defendant, K-MART CORPORATION, as punitive damages, the sum of FIVE HUNDRED THOUSAND ($500,000.00) Dollars, with costs that shall bear interest at the rate of 12% a year for which let execution issue.

3. That Plaintiff, HARVEY GORDON, also recover from Defendant, PETER MIRAMBEAU, as punitive damages, the sum of TWO THOUSAND ($2,000.00) Dollars, with costs that shall bear interest at the rate of 12% a year, for which let execution issue.

4. That Plaintiff, HARVEY GORDON, also recover from Defendant, DAVID SPARROCK, as punitive damages, the sum of TEN THOUSAND ($10,000.00) Dollars, with costs that shall bear interest at the rate of 12% a year, for which let execution issue.

5. That the Court reserves jurisdiction to determine and award the appropriate Cost Judgment(s).

DONE AND ORDERED at the Dade County Courthouse, Miami, Florida, this 27th day of July, 1989.

/s/ Margarita Esquiroz
CIRCUIT COURT JUDGE

Copies furnished to:

Bernard B. Weksler, Esq.
Neil Robertson, Esq.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NUMBER: 87-44067 CA 10

FILED FOR RECORD
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CLERK, CIRCUIT/COUNTY CTS
DADE COUNTY FLORIDA

HARVEY GORDON,

Plaintiff,

vs.

K MART CORPORATION, DAVID SPARROCK
and PETER MIRAMBEAU,

Defendants.

ORDER AMENDING FINAL JUDGMENT

THIS CAUSE having come to be heard on the Defendants' MOTION FOR AMENDMENT OF FINAL JUDGMENT AND FOR PROTECTIVE ORDER AS TO THE DEFENDANTS' BOND and the Court having heard argument of counsel, and being otherwise advised in the Premises, it is hereupon

ORDERED AND ADJUDGED

1. It appearing that the Final Judgment dated July 27, 1989 and recorded on the 28th day of July, 1989, in the Official Records Book No. 14195 at Page 1542 of the Public Records of Dade County, Florida was in error in that it failed to make sixty (60) percent of the punitive damages awarded payable to the State of Florida pursuant to section 768.73, Florida Statutes (1987), the same is hereby amended

nunc pro tunc so that the said Final Judgment shall read as follows:

PURSUANT TO the verdict rendered in this action, it is

ORDERED AND ADJUDGED that the Plaintiff, HARVEY GORDON, recover from the Defendants, K MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, the sum of TWO HUNDRED SEVENTY-SEVEN THOUSAND THREE HUNDRED AND 00/100 ($277,300.00) with costs to be hereinafter taxed, that shall bear interest at the rate set by Florida Statute for which let execution issue.

Pursuant to section 768.73, Florida Statutes (1987) a judgment is hereby entered in favor of the General Revenue Fund of the State of Florida in the amount of THREE HUNDRED SEVEN THOUSAND TWO HUNDRED AND 00/100 DOLLARS ($307,200.00) which sum represents sixty (60) percent of the punitive damage award.

2. This Court hereby directs the Clerk to amend the Final Judgment accordingly.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida on this 9th day of October, 1990.

/s/ Margarita Esquiroz
CIRCUIT COURT JUDGE

Copies furnished to:

Bernard B. Weksler, Esq.
Neil P. Robertson, Esq.
Craig B. Willis, Esq.

STATE OF FLORIDA, COUNTY OF DADE
I HEREBY CERTIFY that the foregoing is a true and correct copy of the original on file in this office
OCT- 9 1990

CLERK, Circuit and County Courts
By /s/ Alicia Riechmann 5307
Deputy Clerk

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1990

CASE NO. 89-2617

K-MART CORPORATION, etc., et al.,

Appellants,

vs.

HARVEY GORDON,

Appellee.

Opinion filed August 7, 1990.

An Appeal from the Circuit Court for Dade County, Margarita Esquiroz, Judge.

Peters, Pickle, Niemoeller, Robertson, Lax & Parsons and Yvette Rhodes Prescott, for appellants.

Bernard B. Weksler, for appellee.

Before SCHWARTZ, C.J., and NESBITT and GERSTEN, JJ.

PER CURIAM.

Affirmed. See Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978); Marks v. Mandel, 447 So.2d 1036 (Fla. 3d DCA 1985); Luckie v. Piggly-Wiggly Southern, Inc., 173 Ga.App. 177, 325 S.E.2d 844 (1984); Adams v. Zayre Corp., 148 Ill.App.3d 704, 499 N.E.2d 678 (1986); Krohne v.

Orlando Farming Corp., 102 So.2d 399 (Fla. 2d DCA 1958); H.I. Holding Co. v. Dade County, 129 So.2d 693 (Fla. 3d DCA 1961), cert. denied, 133 So.2d 646 (Fla. 1961); Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978); Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976); Fla.R.Civ.P. 1.470(b); Sharpsteen v. Keesler, 178 So.2d 623 (Fla. 3d DCA 1965); see also Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. ——, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989); Davis v. State, 383 So.2d 620 (Fla. 1980).

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1991

CASE NO. 90-2497

HARVEY GORDON,

Appellant,

vs.

STATE OF FLORIDA,
K-MART CORPORATION, etc., et al.,

Appellees.

Opinion filed August 27, 1991.

An Appeal from the Circuit Court for Dade County, Margarita Esquiroz, Judge.

Bernard B. Weksler, for appellant.

Robert A. Butterworth, Attorney General, and Craig B. Willis, Assistant Attorney General; Peters Pickle Niemoeller Robertson Lax & Parsons and Yvette Rhodes Prescott, for appellees.

Roy D. Wasson for Academy of Florida Trial Lawyers as amicus curiae.

Mershon Sawyer Johnston Dunwody & Cole and Edward T. O'Donnell for Product Liability Advisory Council as amicus curiae.

Before SCHWARTZ, C.J., and NESBITT and GERSTEN, JJ.

SCHWARTZ, Chief Judge.

By this decision, we uphold the legislature's authority to allot a portion of a punitive damages award to the state.

I

Harvey Gordon was falsely imprisoned and battered by employees of K-Mart Corporation in an incident which occurred in one of its stores on February 16, 1987. In the ensuing action by Gordon against K-Mart, he recovered a jury verdict for $72,500 in compensatory damages and $512,600 in punitive damages. A final judgment for these amounts was entered in Gordon's favor on July 27, 1989, and post-trial motions were denied on October 5, 1989. Subsequently, in K-Mart Corp. v. Gordon, 565 So.2d 834 (Fla. 3d DCA 1990) (per curiam), the judgment was entirely affirmed.

After the issuance of the mandate, K-Mart, on September 20, 1990, moved to amend the final judgment pursuant to Florida Rule of Civil Procedure 1.540, and the State of Florida moved to intervene as a party plaintiff for the purpose of applying section 768.73(2)(b), Fla. Stat. (Supp. 1986).[1] That section, which was part of the Tort Reform and Insurance Act of 1986, which became effective July 1, 1986, requires that 60% of any punitive damages award be payable either to the Public Assistance Trust Fund

[1]Section 768.73(2)(b) provides:

> If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund created in s. 409.2662; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

or, as in this case, to the General Revenue Fund of the state. On October 9, 1990, the trial court granted these motions and entered the following final judgment *nunc pro tunc* the date of the original judgment:

> PURSUANT TO the verdict rendered in this action, it is ORDERED AND ADJUDGED that the Plaintiff, HARVEY GORDON, recover from the Defendants, K MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, the sum of TWO HUNDRED SEVENTY-SEVEN THOUSAND THREE HUNDRED AND 00/100 ($277,300.00) with costs to be hereinafter taxed, that shall bear interest at the rate set by Florida Statute for which let execution issue.
>
> Pursuant to section 768.73, Florida Statutes (1987) a judgment is hereby entered in favor of the General Revenue Fund of the State of Florida in the amount of THREE HUNDRED SEVEN THOUSAND TWO HUNDRED AND 00/100 DOLLARS ($307,200.00) which sum represents sixty (60) percent of the punitive damage award.

2. This Court hereby directs the Clerk to amend the Final Judgment accordingly. Gordon now appeals from that portion of the amended judgment which, in effect, transfers $307,200.00 from him to the State of Florida.[1] He raises the dual contentions that section 768.73(2)(b) is unconstitutional and that the manner in which his initial judgment was

---

[1]K-Mart has paid the amount of the judgment including the entire punitive award into the registry of the court. The compensatory award and the 40% of the punitive damages to which Gordon is indisputably entitled have been released to him. Accordingly, the only controversy is between Gordon and the state as to the entitlement to the 60% allocation provided by the statute.

amended to reflect the state's recovery was procedurally invalid. We find that neither of these contentions has merit.

II

With all due respect,[3] we find that Gordon's constitutional attacks upon the statute are very insubstantial:

1. *No deprivation of due process right to property.*

The appellant's first claim — that the statute constitutes an unconstitutional "taking" of a property right without due process — is wholly without merit. This is true simply because he has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages, see Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987); University of Miami v. Echarte, ___ So.2d ___ (Fla. 3d DCA Case no. 90-982, opinion filed, June 11, 1991) [16 FLW D1539], the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that th very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether. Ross v. Gore, 48 So.2d 412 (Fla. 1950); cf. Pacific Mutual Life Ins. Co. v. Haslip, ___ U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). As our court clearly stated in *Ross*:

> As to question No. 1, plaintiff contends that the statute has "changed the amount of damages recoverable, and thus has unconstitutionally

[3]We have noticed that this phrase is almost always employed, as it is here, when very little, if any, respect is actually deemed "due" to the contention or institution to which it is directed.

> impaired appellant's rights." There is no merit to this contention. As to the denial of "punitive damages," such damages are allowed, not as compensation to a plaintiff, but as a deterrent to others inclined to commit a similar offense, and their allowance depends on malice, moral turpitude, wantonness or outrageousness of tort. Dr. P. Phillips & Sons, Inc., v. Kilgore, 152 Fla. 578, 12 So.2d 465. The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. Kelly v. Hall et al., 191 Ga. 470, 12 S.E.2d 881; Osborn v. Leach, 135 N.C. 628, 47 S.E. 811. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant.

Ross, 48 So.2d at 414; accord Louisville & Nashville R.R. v. Street, 164 Ala. 155, 51 So. 306 (1909); Smith v. Hill, 12 Ill.2d 588, 147 N.E.2d 321 (1958).

In addition, because the incident in question, much less the entry of the final judgment, occurred subsequent to the effective date of the statute, the case is governed also by the rules that (a) where an existing statute provides that funds recovered under it are subject to a prior claim, a party cannot thereafter obtain a vested right to that claim, see United States Fidelity & Guar. Co. v. Department of Ins., 453 So.2d 1355 (1984), and that (b) even substantive rights and obligations created by statute do not vest until the accrual of the cause of action which gives rise to them. L. Ross, Inc. v. R. W. Roberts Const. Co., 466 So.2d 1096 (Fla. 5th DCA 1985), aff'd, 481 So.2d 484 (Fla. 1986). For all these reasons, we summarily reject the contention that the state has invalidly taken a property right of the plaintiff. *Ross*, 48 So.2d at 412.

2. *No violation of substantive due process rights.*

We find Gordon's alternative contention that section 768.73(2)(b) is "arbitrary" and "unreasonable" and therefore somehow deprives him of his rights to substantive due process on that basis even less persuasive. To successfully surmount such an objection, it need only be shown that the statute under attack bears a rational relation to a legitimate legislative interest or objective. Abdala v. World Omni Leasing, Inc., ____ So.2d ____ (Fla. Case nos. 75,966 & 75,968, opinion filed, June 27, 1991) [16 FLW S464]; Vildibill v. Johnson, 492 So.2d 1047 (Fla. 1986). At least two such bases of 768.73(2)(b) are readily apparent:

(a) it is clear that the present statute[4] is founded upon and directly serves one of the most basic justifications for the existence of punitive damages in the first place: to serve as punishment for what amounts to a public wrong and thus to protect the public by inhibiting future such conduct. Ingram v. Pettit, 340 So.2d 922, 924 (Fla. 1976) ("It has long been established that the availability of punitive damages is reserved to those kinds of cases where private injuries partake of public wrongs. The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly."); Florida Southern R.R. v. Hirst, 30 Fla. 1, 11 So. 506 (1892); 22 Am.Jur.2d Damages § 734 (1988) ("The intentional or reckless infliction of harm may be likened to culpable negligence in criminal cases and authorizes the infliction of punishment which may deter future harm to the public. So viewed, punitive damages are allowed on grounds of public policy and in the interest of society and for the

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[4]Several other states have enacted similar statutes. See Colo. Rev. Stat. § 13-21-102(4) (1987); Ga. Code Ann. § 51-12-5.1(e)(2) (Supp. 1987); Ill. Rev. Stat. Ch. 110, para. 2-1207 (Supp. 1987); Iowa Code Ann. § 668A.1(2)(b) (West Supp. 1987); Mo. Stat. Ann. § 537.675 (1987).

public benefit."). The allotment of a portion of these funds directly to the State as a representative of the public whose interest the award is thus largely designed to serve, may obviously have been viewed by the legislature as an appropriate means of effecting that legitimate purpose.[5] We agree with the thrust of Justice Shores's opinion in Fuller v. Preferred Risk Life Ins. Co., 577 So.2d 878, 886-87 (Ala. 1991) (Shores, J., concurring specially), that, on this basis, the courts may make such an allocation even in the absence of statutory authorization:

> If the court concludes that the amount is not so excessive as to deprive the defendant of his property in contravention of § 13, Ala. Constitution 1901, it nevertheless may also determine that it would be in the best interest of justice to require the plaintiff to accept less than all of the amount and to require the defendant to devote a part of the amount to such purposes as the court may determine would best serve the goals for which punitive damages are allowed in the first place: vindication of the public and deterrence to the defendant and to others who might commit similar wrongs in the future.
>
> * * *
>
> The courts, however, have inherent authority to allocate punitive damages, with jurisdiction over both plaintiff and defendant, by reducing the amount that the plaintiff is to receive to less than the full amount of the verdict, and directing the defendant to pay a part of a punitive damages

[5]Of course, since the legislature could have abolished the punitive damage claim altogether, or under this rationale, required that *all* of the award be payable to the state, the plaintiff can hardly complain that the determination that 60% (as opposed to 30% or 90%) was inappropriate.

award to the state general fund or any special fund devoted to the furtherance of justice on behalf of all the people. To do so in proper cases could serve the purpose for which punitive damages were authorized to a greater degree than would allowing the plaintiff to receive the entire amount.

Fuller, 577 So.2d at 886-87.

(b) The legislative history indicates that one reason for the provision in question was to discourage punitive damages claims by making them less remunerative to the plaintiff and his attorneys. See § 768.73(4), Fla. Stat. (Supp. 1986).[6], [7] Since the legislature had every right to conclude, as a matter of public policy, that such suits *should* be

---

[6]Section 768.73(4) provides:

Claimant's attorney's fees, if payable from the judgment, shall, to the extent that they are based on the punitive damages, be calculated based only on the portion of the judgment payable to the claimant as provided in subsection (2). Nothing herein shall be interpreted as limiting the payment of attorney's fees based upon the award of damages other than punitive damages.

[7]Because he is not a party to this controversy, see Warshaw-Seattle, Inc. v. Clark, 85 So.2d 623 (Fla. 1955), we do not consider here the personal claim of Gordon's attorney that the statutory scheme invalidly interferes with his rights under his fee contract with his client. But see Gamble v. Wells, 450 So.2d 850 (Fla. 1984), which is directly contrary to this contention.

Without expressing any opinion on the issue, however, we note the possibility of a separate quantum meruit claim by the attorney *against the state* for the services rendered in recovery of the 60% of the punitive damages on its behalf. See Government Employees Ins. Co. v. Graff, 327 So.2d 88 (Fla. 1st DCA 1976); *Fuller*, 577 So.2d at 886-87 (Shores, J., specially concurring).

discouraged — even eliminated — this affords a perfectly legitimate ground for upholding the statute.[8], [9]

III

Turning to the procedural objections to the effectuation of the statute by substituting the state for Gordon as to $307,200.00 of the punitive damages award, we also find no merit.

1. First, it is clear that the trial judge properly exercised her discretion, even after judgment, to permit the state to intervene as a plainly interested party plaintiff. Wags Transp. System v. City of Miami Beach, 88 So.2d 751 (Fla. 1956).

2. The amendment to the initial judgment, to reflect the clear and mandatory terms of a controlling statute, was properly effected to correct "an error therein arising from oversight" under Florida Rule of Civil Procedure 1.540(a),[10] see Stuckey v. Northern Propane Gas Co., 874 F.2d 1563

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[8]We relegate to a footnote the claim that Gordon obtained a constitutionally vested right to 100% of the punitive damages when the initial judgment for that amount was entered in his favor. Because that judgment was obviously erroneously entered as in contravention of a contrary statute, this contention is equivalent to stating that no judgment may constitutionally be corrected or reversed on appeal.

[9]In deciding that § 768.73(2)(b) is valid, we have not overlooked McBride v. General Motors Corp., 737 F.Supp. 1563 (M.D. Ga. 1990). We find its brief discussion of the present issue, 737 F.Supp. at 1578, completely unpersuasive.

[10]This was the view correctly adopted by the trial judge below:

> THE COURT: I don't think this is a clerical mistake. I think it's a mistake on my part but not a clerical one, in other words in typing. I did not miswrite anything or whoever prepared the order did not miswrite anything.

(Footnote continued on next page)

(11th Cir. 1989) (verdict corrected to properly apportion damages according to Georgia law); United States v. Griffin, 782 F.2d 1393 (7th Cir. 1986) (interest rate in judgment correctable after property sold at auction); O'Tell v. New York, New Haven & Hartford R.R., 236 F.2d 472 (2nd Cir. 1956) (judgment amended to reflect deduction from damages of sum plaintiff received for executed release; omitted in jury charge prior to verdict); First Nat'l Bank v. National Airlines, Inc., 167 F.Supp. 167 (S.D.N.Y. 1958) (judgment overlooking statute awarding costs upon dismissal of suit amendable), or to correct a plain "mistake" under Florida Rule of Civil Procedure 1.540(b).[11] See Taylor v. United States, 821 F.2d 1428 (9th Cir. 1987) (government did not waive claim to statutory limitation on non-economic damages for professional negligence where it failed to assert it prior to judgment), cert. denied, 485 U.S. 992, 108 S.Ct. 1300, 99 L.Ed.2d 510 (1988); Federal Deposit Ins. Corp. v. Castle, 781 F.2d 1101 (5th Cir. 1986) (retroactive social security benefits subject to statutory limitation asserted for first time in Rule 60(b) motion); Meadows v. Cohen, 409 F.2d 750, 753 (5th Cir. 1969) (trial court properly amended judgment under Fed. R. Civ. P. 60(b) to statutorily limit disability benefit government had failed to bring to trial judge's attention).

Finally, the court properly proceeded under 1.540 notwithstanding our affirmance of the earlier judgment,

---

(Footnote continued from previous page)

It was an oversight in the sense that I did not realize that it was meant to be interpreted that it would exclude the statute. And that was not my intention in any way, shape or form, you know. So it was an oversight on my part in that regard.

[11]The 1.540 motion was timely under either 1.540(a), which provides that it may be invoked "at any time," or under 1.540(b), since it was filed within a year after the denial of the post-trial motions. See Pruitt v. Brock, 437 So.2d 768 (Fla. 1st DCA 1983). See generally Franklin v. Franklin, 573 So.2d 401 (Fla. 3d DCA 1991).

Ohio Casualty Group v. Parrish, 350 So.2d 466 (Fla. 1977); Avant v. Waites, 295 So.2d 362 (Fla. 1st DCA 1974),[12] and without obtaining this court's permission to do so. *Ohio Casualty*, 350 So.2d at 466.

Affirmed.[13]

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[12]We therefore deny Gordon's motion to enforce the prior mandate in the original appeal, case no. 89-2617.

[13]We certify to the Supreme Court that this case involves a question of great public importance as to the constitutionality of § 768.73(2)(b), Fla. Stat. (Supp. 1986).

SUPREME COURT OF FLORIDA

No. 78,638

HARVEY GORDON,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondents.

[November 12, 1992]

PER CURIAM.

We review a question certified to be of great public importance: whether sub-section 768.73 (2)(b), Florida Statutes (Supplement 1986), is constitutional. *Gordon v. State*, 585 So.2d 1033, 1038 n.13 (Fla. 3d DCA 1991). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Harvey Gordon was falsely imprisoned and battered by employees of K-mart Corporation in an incident in one of its stores on February 16, 1987. Gordon recovered a jury verdict against K-Mart for $72,500 in compensatory damages and $512,600 in punitive damages, which was affirmed on appeal. *K-Mart Corp. v. Gordon*, 565 So. 2d 834 (Fla. 3d DCA 1990). After the mandate was issued, K-Mart, on September 20, 1990, moved to amend the final judgment pursuant to Florida Rule of Civil Procedure 1.540, and the State moved to intervene to assert its interest in sixty percent of the punitive damages award pursuant to subsection 768.73(2)(b), Florida Statutes (Supplement 1986), which provides:

> If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund created in s. 409.2662; otherwise, 60 percent

> of the award shall be payable to the General Revenue Fund.

This provision became effective on July 1, 1986, as part of the Tort Reform and Insurance Act of 1986. Ch. 86-160, §§ 52, 70, Laws of Fla. The district court upheld the trial court's award to the State. *Gordon v. State*, 585 So. 2d 1033 (Fla. 3d DCA 1991). Gordon contends that subsection (2) is unconstitutional. Gordon's attorneys contend that subsection 768.73(4), Florida Statutes (Supplement 1986), also is unconstitutional. We disagree and approve the decision below.

As the district court noted:

> [Gordon] has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages, the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such a recovery or even abolish it altogether.

Gordon, 585 So. 2d at 1035-36 (citations omitted). This Court said in *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950):

> The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages. It cannot, then, be said that the denial of punitive damages has unconstitutionally impaired any property rights of appellant:

(Citations omitted.) The incident here occurred subsequent to the effective date of the statute and thus the award clearly is governed by the statute.

We agree with the trial court that no substantive due process violation occurred. The statute under attack here bears a rational relationship to legitimate legislative objectives: to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney.

We also have considered the other constitutional claims raised and suffice it to say that the statute does not violate the right to trial by jury, does not constitute a tax on judgments, does not deny equal protection and is not a special law.

We further agree that the trial court's amendment to the initial judgment was proper because Florida Rule of Civil Procedure 1.540(b) authorizes relief from judgment based on "mistake" or "inadvertence," if the motion is made "not more than one year after the judgment." We approve *Pruitt v. Brock*, 437 So. 2d 768 (Fla. 1st DCA 1983) (holding that the one-year limit of rule 1.540(b) runs from the disposition of a timely-filed motion for rehearing). Although judgment in this case was entered on July 27, 1989, posttrial motions were not denied until October 5, 1989. The rule 1.540 motion was filed on September 20, 1990.

We moreover find no merit to counsel's claim that subsection 768.73(4), providing that attorney's fees, "if payable from the judgment, shall, to the extent that they are based on the punitive damages, be calculated based only on the portion of the judgment payable to the claimant." Valid laws in effect at the time a contract is made enter into and become part of the contract as if expressly incorporated into

the contract. *State ex rel. Select Tenures, Inc. v. Raulerson*, 129 Fla. 346, 176 So. 270 (1937). Gordon's cause of action accrued after the effective date of section 768.73 and the contingent fee contract was entered into after the statute went into effect; hence the statute did not impair any preexisting contractual rights of Gordon's attorney.

Accordingly we answer the question certified in the affirmative and approve the decision of the district court.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, GRIMES, KOGAN and HARDING, JJ., concur.

SHAW, J., concurs in part and dissents in part with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Shaw, J., concurring and dissenting.

I agree that subsection 768.73(4) is constitutional. I cannot agree that subsections 768.73(2) and (5) are constitutional.

This Court has said that "[w]hen the right to collect money under the terms of a decree has vested, it is not within the province of a court to divest such right." *Blocker v. Ferguson*, 47 So. 2d 694, 698 (Fla. 1950). We have noted that "[i]t is also well settled that the judgment of an appellate court, where it issues a mandate, is a final judgment in the cause and compliance therewith by a lower

court is a purely ministerial act."[1] *O.P. Corp. v. Village of N. Palm Beach*, 302 So. 2d 130, 131 (Fla. 1974). Mr. Gordon had a vested property right by the time the State intervened to claim its lion's share of the punitive damage award.

We said in *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991):

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I, § 9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of the individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights.

The encroachment here is unjustified under this standard.

Our sister court, in *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), held that a similar statute (giving one-third of a judgment for exemplary damages to the state general fund) unconstitutional. It found the statute to be a forced taking of property unrelated to any constitutionally

---

[1]The final judgment in this case was affirmed by the district court on August 7, 1990, and the mandate issued on September 19, 1990, before the State's post-judgment intervention.

permissible governmental interest and, therefore, violative of the federal and state constitutional proscriptions against taking private property without just compensation. The court said:

> In our view, forcing a judgment creditor to pay to the state general fund one-third of a judgment for exemplary damages in order to fund services which have already been funded by other revenue-raising measures, and without conferring on the judgment creditor any benefit or service not furnished to other civil litigants not required to make the same contribution, amounts to an unconstitutional taking of the judgment creditor's property in violation of the Taking Clause of the United States and the Colorado Constitutions.

Id. at 272. The court noted that this is particularly true where "the judgment itself results exclusively from the judgment creditor's time, effort, and expense in the litigation process without any assistance whatever from the state." *Id.* The court also found significant "the absence of any demonstrable nexus between, on the one hand, any alleged governmental interest in punishing and deterring . . . tortious conduct and, on the other, the statutory imposition of the forced contribution on the person injured by the wrongful conduct." *Id.* at 273. I find these observations equally pertinent here: the State did nothing to earn its sixty-percent share of the punitive damage award; and a nexus between deterrence and the forced contribution from the injured person is absent.

The United States Supreme Court held unconstitutional, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), a Florida statute giving $100,000 in interest accruing on moneys placed in the

registry of the court to counties as a fee for using the courts.[2] It said:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" . . . . . [A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against arbitrary use of governmental power.

Id. at 164. The court held constitutional, by contrast, a federal statute deducting one and one-half percent from the first five million dollars of an arbitration award entered by a federal claims tribunal, as reimbursement for administrative expenses. *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989). The court declined to define what percentage of an award would be "too great a take" because it found that "by any standard of excessiveness," one and one-half percent was not too great. *Id.* at 395. I agree that one and one-half percent of a limited portion of an award is not a taking; the instant statute, by contrast, is "too great a take" "by any standard of excessiveness," and, therefore, a taking.

I also view section 768.73(5), Florida Statutes (Supplement 1886), as constitutionally infirm, because it contravenes our state constitutional guarantee of the right to trial by jury. Our constitution provides: "The right of trial by jury shall be secure to all and remain inviolate." Art. I,

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[2]The unconstitutional statute, in relevant part, provided: "All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys . . . ." § 28.33, Fla. Stat. (1973).

§ 22, Fla. Const. It is the jury's function to determine the amount of damages, including punitive damages, to be awarded in this case. *See Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[N]othing is better settled than that, in such cases as [intentional torts], and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict."). The statutory mandate to keep secret from the jury the State's sixty-percent take of the punitive damage award prevents the jury from performing its proper function. Moreover, when information essential to the jury's determination of damages is kept from it, due process is denied, in violation of our state and federal constitutions. Art. I, § 9, Fla. Const.; U.S. Const. amend. XIV.

For these reasons I dissent.

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NUMBER: 87-44067 CA 10

HARVEY GORDON,

Plaintiff,

vs.

K MART CORPORATION, DAVID SPARROCK
and PETER MIRAMBEAU,

Defendants.

MOTION FOR AMENDMENT OF FINAL
JUDGMENT AND FOR PROTECTIVE ORDER
AS TO THE DEFENDANTS' BOND
Florida Bar No. 287180

COME NOW the Defendants, K MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU, by and through their undersigned counsel, and move that this court enter an order amending the Final Judgment to comply with Florida Statute 768.73(2)(b) and protecting the Defendants from execution either on the judgment or the appeal bond in violation of the above-referenced statute, and as grounds would state the following:

1. The jury returned a verdict in this cause which included an award of punitive damages in the amount of FIVE HUNDRED TWELVE THOUSAND AND 00/100 DOLLARS ($512,000.00).

2. Section 768.73, Florida Statutes (1989) provides in relevant part that in any civil action, other than an action based on personal injury or wrongful death, where an award

of punitive damages is made sixty (60) percent of the award *shall be made payable* to the State General Revenue Fund.

3. The Final Judgment entered in this cause did not make sixty (60) percent of the punitive damage award payable to the General Revenue Fund. Accordingly, Defendants request that this Court enter an order, pursuant to Fla.R.Civ.P. 1.540(a), amending the final judgment entered in the cause so that it comports with the requirements of section 768.73.

4. Defendants brought an appeal from the final judgment, which this Court affirmed. *K-Mart v. Gordon*, 15 F.L.W. D2020 (Fla. 3d DCA Aug. 7, 1990). Rehearing was denied on September 6. On September 13, Defendants moved to stay the Mandate pending further review of this case by the United States Supreme Court; however, the Mandate was issued on September 19, 1990.

5. In anticipation of having to satisfy the final judgment should the judgment be ultimately affirmed, counsel for Appellant contacted Insurance Commissioner Tom Gallagher and other State officials regarding the proper procedure to be followed in order to comply with section 768.73.

6. Attached hereto is a letter from Mr. Gallagher delineating the procedures to be followed in making this payment to the State and stating that said obligation to make to make payment is the responsibility of the Defendants.

7. Counsel then forwarded a copy of Mr. Gallagher's letter to Plaintiff's counsel to advise him of the procedures required.

8. Attached hereto is an August 28, 1990 letter from Plaintiff's counsel indicating the Plaintiff's personal belief of the unconstitutionality of section 768.73 and making threats against the Defendants should the Defendants refuse to comply with the Statute, which has not been found unconstitutional.

9. Attached hereto is a letter dated September 17, 1990 from Plaintiff's counsel to the surety of Defendants' supersedeas bond wherein he demands full payment of the final judgment within seven (7) days and a letter to Defendants' counsel threatening further action against the supersedeas bond evne [sic] though the Court continues to have jurisdiction in this cause.

WHEREFORE, the Defendants would request that this Court enter an order amending the final judgment and protecting Defendants from execution on either the final judgment of the supersedeas bond and delineating the relative responsibilities and duties of the parties with regards to Florida Statute 768.73 (2)(b).

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Bernard Weksler, Esquire, Attorney for Plaintiff, 522 Gables International Plaza, 2655 LeJeune Road, Coral Gables, Florida 33134 on this 20th day of September, 1990.

PETERS, PICKLE, NIEMOELLER,
ROBERTSON, LAX & PARSONS
Attorneys for Defendants
Suite 628 Ingraham Building
25 Southeast 2nd Avenue
Miami, Florida 33131
(305) 374-3103

By:/s/ Neil P. Robertson
NEIL P. ROBERTSON

YRP/me
9/20/90
KMA89030

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT, IN AND FOR DADE
COUNTY, FLORIDA

CASE NO. 87-44067 CA 10

RECEIVED
OCT-9 1990
BERNARD B. WEKSLER

HARVEY GORDON,

Plaintiff,

-vs-

K-MART, SPARROCK & MIRAMBEAU,

Defendants.

STATE OF FLORIDA'S PETITION TO INTERVENE

COMES NOW the State of Florida, by and through undersigned counsel, and hereby petitions the Court for permission to intervene and assert its rights pursuant to § 768.73, Fla.Stat., and as grounds therefor states as follows:

1. Section 768.73(2)(b), Fla. Stat., requires that in any civil action, 60 percent of any award of punitive damages shall be made payable to either the Public Medical Assistance Trust Fund or the General Revenue Trust Fund, depending upon the nature of the cause of action.

2. The Department of Health and Rehabilitative Services is the state agency responsible for administering the Public Medical Assistance Trust Fund (PMATF) created pursuant to Section 409.266, Florida Statutes.

3. In the present case, according to information available to the State, the jury returned an award of punitive

damages, 60 percent of which would be $307,200. The cause of action was apparently based upon personal injury.

4. The Final Judgment entered in this case did not make 60 percent of the punitive damage award payable to the PMATF, as provided by statute.

5. The State, in order to protect and defend its statutory rights, seeks intervention because its interest in this litigation is of such direct and immediate character that it will either gain or lose by direct legal operation and effect of the judgment if it is not permitted to intervene. *Citibank, N.A. v. Blackhawk Heating & Plumbing Co., Inc.*, 398 So.2d 984 (Fla. 1981); *appeal after remand*, 478 So.2d 76 (Fla. 4th DCA 1985).

WHEREFORE, the State of Florida hereby seeks intervention because of its direct interest in this litigation.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/ Craig B. Willis

CRAIG B. WILLIS
Assistant Attorney General
Florida Bar No. 0257656

DEPARTMENT OF LEGAL AFFAIRS
The Capitol, Suite 1601
Tallahassee, FL 32399-1050
(904) 488-8253

COUNSEL FOR INTERVENOR

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE OF FLORIDA'S PETITION TO INTERVENE has been furnished to NEIL P. ROBERTSON and YVETTE PRESCOTT, Peters, Pickle, Niemoeller, Robertson, Lax & Parsons, Suite 628 Ingraham Building, 25 S.E. 2nd Avenue, Miami, Florida 33131-1691, Counsel for Defendants; and to BERNARD B. WEKSLER, 2655 Le Jeune Road, 522 Gables International Plaza, Coral Gables, Florida 33134, Counsel for Plaintiff, by U. S. Mail this 4th day of October, 1990.

/s/ Craig B. Willis
CRAIG B. WILLIS

RECEIVED
OCT 10 1990
BERNARD B. WEKSLER

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY,
FLORIDA

GENERAL JURISDICTION DIVISION

CASE NUMBER: 87-44067 CA 10

HARVEY GORDON,

Plaintiff,

vs.

K-MART CORPORATION, DAVID SPARROCK and
PETER MIRAMBEAU,

Defendants.

ORDER GRANTING STATE
OF FLORIDA'S PETITION
TO INTERVENE

THIS CAUSE having come to be heard on October 9, 1990, on the STATE OF FLORIDA'S PETITION TO INTERVENE, and the Court having heard argument of counsel and the STATE OF FLORIDA and being duly advised in the premises does hereby

ORDERED AND ADJUDGED that said Motion is GRANTED.

DONE AND ORDERED in Miami, Dade County, Florida this 9th day of October, 1990.

JUDGE MARGARITA ESQUIROZ
CIRCUIT COURT JUDGE

Copies Furnished to:

Neil Robertson, Esq.
Bernard Weksler, Esq.
Craig Willis, Esq.

AUG 20 1990

OFFICE OF THE TREASURER
DEPARTMENT OF INSURANCE
Division of Risk Management,
Larson Building, G-71
Tallahassee, Florida 32399-0300

TOM GALLAGHER
TREASURER
INSURANCE COMMISSIONER
FIRE MARSHAL

August 17, 1990

Mr. Neil P. Robertson
Peters, Pickle, Niemoeller,
Robertson, Lax & Parsons
Suite 628 Ingraham Building
25 S.E. 2nd Avenue
Miami, Florida 33131-1691

Dear Mr. Robertson:

I have reviewed your letter of August 8, 1990, inquiring as to any procedures your firm would need to follow in complying with Florida Statutes 768.73(2)(b). After checking with our departmental staff, I have learned that Attorney Craig Willis at the Attorney General's office has been handling these matters for the State. He can be contacted at (904) 488-8253.

Past procedure has been for the defendant's law firm to contact the Attorney General's office to arrange for payment. The payment will need to be sent to the State Comptroller's office, and Joan Levin is the contact person in that office who handles these matters. The payment will need to be payable to the Public Medical Assistance Trust Fund or the State of Florida, depending on the type of litigation involved, and in this respect you should contact Mr. Willis to advise him of the nature of the judgement award.

The Comptroller's office will provide your client with a receipt and release, which should act to satisfy your client's responsibilities under the statute. The Attorney General's office advises that a satisfaction of judgement would not be appropriate since the State of Florida was not a party to the litigation.

I hope this information will be of benefit to you. The Attorney General's office advised that they received their copy of your letter and are ready to work with your firm in processing this matter.

Sincerely,

/s/ Tom Gallagher

Tom Gallagher
Treasurer and
Insurance Commissioner

TG-C/w

cc: R. J. Castellanos, Director
Division of Risk Management

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 87-44067 (CA 10)

FL BAR NO.: 086117

HARVEY GORDON,

Plaintiff,

vs.

K-MART CORPORATION, DAVID SPARROCK and PETER MIRAMBEAU,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR AMENDMENT OF FINAL JUDGMENT, ETC.

COMES NOW the Plaintiff, HARVEY GORDON, by and through his undersigned counsel, and moves this Court to deny the Defendants' Post Appeal Motions, including the Motion to Amend Final Judgment, and says:

* * *

19. In the event the State of Florida feels that it is entitled to any part of the punitive damages awarded to the Plaintiff, the State of Florida may institute or initiate any action which it may deem appropriate or proper. The Plaintiff will then have the opportunity to contest the validity and constitutionality of *Florida Statute* §768.73.

20. The State of Florida is not a party in this cause, and has not attempted to intervene in this cause. Therefore,

the State of Florida should not be permitted to do so indirectly by the actions of the Defendants.

WE DO HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered this 9th day of October, 1990 to Neil P. Robertson, Esq., PETERS, PICKLE, et al., Attorneys for the Defendants, 628 Ingraham Building, 25 Southeast Second Avenue, Miami, Florida 33131.

BERNARD B. WEKSLER, ESQ.
Attorney for Plaintiff
522 Gables International Plaza
2655 Le Jeune Road
Coral Gables, Florida 33134
(305) 446-2826

By: /s/ Bernard B. Weksler
BERNARD B. WEKSLER

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY,
FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 87-44067 (CA 10)

HARVEY GORDON,

Plaintiff,

vs.

K-MART CORPORATION, et al.,

Defendants.

Proceedings had in the above-entitled matter before the Honorable MARGARITZ ESQUIROZ, Dade County Courthouse, Miami, Florida, October 9, 1990, beginning at or about 2:30 P.M.

APPEARANCES:

BERNARD B. WEKSLER, ESQ. and
KAREN HAAS, ESQ.
On behalf of Plaintiff

PETERS, PICKLE, NIEMOELIER,
ROBERTSON, LAX & PARSONS
By NEIL P. ROBERTSON, ESQ. and
YVETTE RHODES PRESCOTT, ESQ.
On behalf of Defendant

JODY E. COLLINS, ESQ. and
RICHARD F. SCOTT, ESQ.
On behalf of State of Florida

— — — — — —

* * *

MR. WEKSLER: It's too late for them to intervene anyway. The final judgment has been entered by the court. It's been affirmed by the appellate court.

THE COURT: But they had no stake in the matter before punitive damages were awarded. That's the only time they have any stake in this.

MR. WEKSLER: Your Honor, they had an opportunity to come in at the time the court entered the final judgment. They had an opportunity to come in after that time. They could have filed a response before the matter went up to the appellate court. They could have intervened in the appellate court. They have not done so.

And to come in at this late stage I don't see how they can go ahead and do anything at this late stage. If they want to go ahead with an independent action that might be something else, but I don't see how they can go ahead and intervene and try to change a final judgment which has been affirmed by the appellate court. That's what they would be trying to do when they intervene is have you change the final judgment.

. . . .

MS. COLLINS: Actually there's an error in the motion, and it goes to the general revenue fund.

THE COURT: Okay, the general revenue fund. How could I fail to follow the law even if the State of Florida was not a party to this?

. . . .

MR. WEKSLER: Judge, she still hasn't shown you any law where they're able to intervene after the final judgment. And I might add the reason why I talk about a separate lawsuit is because we would be contesting the constitutionality of the statute. And that would be something we would be testing with them.

* * *

MR. WEKSLER: If the state of Florida thinks that they may have some sort of claim to this, then let them go ahead with some sort of a separate action against Harvey Gordon and claiming that they're entitled to it. And at that time we can go into the issue of the constitutionality of the statute. But the State of Florida sat back all this time.

K-Mart sat — was well aware of this statute. It sat back. The only time it even attempted to modify the final judgment —

THE COURT: Let me ask you something, Mr. Weksler. Where in the law does it say that the State of Florida has to be a party to the litigation or be allowed to intervene or be there to assert its rights? In other words where does it say that the court does not have to apply this statute even if the state is not here?

MR. WEKSLER: The statute does not talk about what the procedure is to follow —

THE COURT: Obviously.

MS. PRESCOTT: That's why we're here.

. . . .

* * *

MR. WEKSLER: I'll tell you what the trial court did. And I don't see how they can come in at this late — because what's going to happen, they come on and intervene. Are we supposed to go ahead and file an answer and raise constitutional issues, and then you're litigating?

* * *

MR. WEKSLER: We're going to be taking up the constitutionality of the statute, and they're going to be paying twice.

* * *

MR. WEKSLER: Well, procedurally if the court is going to go ahead and say that you have the right to let them intervene, I would then proceed to file appropriate motions here in the court, if this court would be the court here contesting the constitutionality of the statute. See --

THE COURT: That's fine.

* * *

CERTIFICATE

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

I, EILEEN J. WILEY, RPR-CM, Notary Public in and for the State of Florida at Large, do hereby certify that I reported in shorthand the hearing before the HONORABLE MARGARITA ESQUIROZ, Circuit Judge, and the foregoing pages, numbered 1 to and including 40, constitute a true and correct record thereof.

I further certify that I am not of counsel, not related to nor employed by any attorney in this suit, and not financially interested in the outcome thereof.

DATED at Miami, Dade County, Florida, this 16th day of October, 1990.

/s/ Eileen J. Wiley
EILEEN J. WILEY, RPR-CM
Notary Public,
State of Florida at Large.

My Commission Expires: 1/6/93

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO.: 90-02497

LOWER TRIBUNAL CASE NO.: 87-44067

HARVEY GORDON,

Appellant,

vs.

K-MART CORPORATION, a Michigan Corporation authorized to do business in the State of Florida, DAVID SPARROCK, and PETER MIRAMBEAU,

Appellees.

INITIAL BRIEF OF APPELLANT

BERNARD B. WEKSLER, ESQ.
Attorney for Appellant
522 Gables International Plaza
2655 Le Jeune Road
Coral Gables, Florida 33134
(305) 446-2826

FL BAR NO.: 086117

* * *

ISSUE III

AN AWARD TO THE STATE OF 60% OF THE PUNITIVE DAMAGES IS UNCONSTITUTIONAL

Florida Statute Section 768.73(2), provides that in any civil action, an award of punitive damages shall be payable as follows: (a) 40% of the award shall be payable to the claimant, and (b) 60% of the award shall be payable either to the Public Medical Assistance Trust Fund or to the General

Revenue Fund of the State of Florida. The 60% award to the State provision is unconstitutional on its face, and in its application here.

That portion of the Statute making 60% of the punitive damage award payable to the State is unconstitutional. It is a brazen attempt, successful in the trial court, to pirate a portion of the Appellant's award without due process or compensation. It has long been the rule that a right to have punitive damages assessed is not a property right which is subject to constitutional protection, but when the Final Judgment is rendered which includes an award for punitive damages, it becomes a vested property right. *Ross v. Gore*, 48 So.2d 412 (Fla. 1950). Such vested property right cannot be constitutionally abrogated or taken away without due process.

The right of a citizen to hold property is a valuable right and one which the sovereign should not and cannot take without due process of law. There has been no due process of law in this instance since the State merely awaited the return of the jury's verdict, the entry of a Judgment on that verdict, including punitive damages, and after said Judgment had been appealed and affirmed by this Court, it then decided that it should have 60% of the punitive award.

The taking of property without due process was terminated more than 735 years ago in 1255, when King John of England permitted the ratification of the Magna Charta which guaranteed the property rights of an individual as well as his liberties. The rights granted by the Magna Charta as well as the Constitution of Florida and the United States, are now being diluted by the actions of an ill-informed legislature and its enforcement at the behest of power-seeking persons or corporate defendants bent on stripping away the rights of the citizenry.

Not only is the taking in this instance of the Appellant's award by the State unlawful, but it also amounts to appropriation by the State of the attorney's services and his work product. If this can be legally justified, then the State could require the farmer to deliver without compensation or appropriate legal proceedings, the second born of each of his cows. In short, we reach the old philosophy that the sovereign can do no wrong, and consequently, if it is done by the sovereign, the citizenry can have no legitimate objections or recourse to just compensation or to prevent the invasion of their property rights. To state the premise is to expose it to the constitutional defect inherent therein.

Once the claim for punitive damage has been reduced to judgment, it cannot be taken away by the legislature or the State, without in return giving the plaintiff a *quid pro quo*.

* * *

Although the appellate courts in Florida have not yet ruled on the constitutionality of *Florida Statutes Section 768.72(2)(b)*, a United States District Court in Georgia has declared a similar act governing punitive damages awards in products liability actions to be unconstitutional. In *McBride v. General Motors Corporation*, 737 F.Supp. 1563 (M.D. Ga. 1990), the Court held that the Georgia Tort Reform At, through its liability punitive damage subsection conferring upon the State a non-party judgment creditor status, and entitling the state to receive 75% of the punitive damage award, violated the excessive fines provision of the State and Federal Constitutions. *U.S.C.A. Const. Amend. 8; Ga. Const. Art. 1 #1, Par. 17.*

EFFECT OF EMINENT DOMAIN

The award of 60% of the punitive damages awarded to the Claimant by a Jury became the property of the Claimant

(and his attorney) when reduced to Final Judgment. The *Constitution of the State of Florida*, provides in *Article X, Section 6*, titled Eminent Domain, that no private property shall be taken except for a public purpose, and with *full compensation* therefore paid to each owner.

Every kind of property, both real and personal, within the jurisdiction of the State, is subject to the power of eminent domain, including intangible and incorporeal rights, such as contracts, causes of action, and patent rights. *21 Fla. Jur.2d "Eminent Domain" #257.* A Judgment is a property right. When, as here, the State seeks to take away 60% of the punitive damages award of the Final Judgment, then the State must pay full compensation therefore to the Claimant. However, neither the offending statute or the trial court's Order Amending Final Judgment, provides for the Claimant receiving his full compensation for the State taking away $307,200.00 of his property.

In addition to the aforementioned reasons for declaring the Statue to be unconstitutional, other reasons include the rewarding of the State at the expense of the Plaintiff and his attorney, the denial of the Plaintiff to full access to the Courts and the full benefits of a Jury Verdict, and the fact that the Statute is an arbitrary, capricious, and invalid exercise of the State's police power.

* * *

CONCLUSION

A Final Judgment in this case for compensatory and punitive damages was appealed to this Court, affirmed by this Court, and the Mandate of this Court was lodged with the trial court. Only after the conclusion of the cause in this Court did the State come in and attempt tc assert alleged rights un [sic] *Florida Statutes Section 768.73(2)(b)*, in its efforts to reclaim without compensation or due process the greater portion of the Appellant's punitive award. This Court should not permit the State in such a situation tc profit by such a flagrant disregard of the rights of one of its citizens. . . .

. . . .

The Order appealed should be reversed.

Respectfully submitted,

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO.: 90-2497

LOWER TRIBUNAL CASE NO.: 87-44067

HARVEY GORDON,

Appellant,

vs.

K-MART CORPORATION, DAVID SPARROCK, PETER MIRAMBEAU, and THE STATE OF FLORIDA,

Appellees.

REPLY BRIEF OF APPELLANT, HARVEY GORDON

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* * *

III. *SECTION 768.73(2), FLORIDA STATUTES*, PERMITTING THE STATE TO OBTAIN 60% OF A PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONAL.

. . . .

The exaction, taking away, improperly and unfairly taxing the Appellant the sum of $307,200.00, (60% of the punitive damages award), is an unlawful taking of his property without due process of law, violating the *Fifth Amendment to the United States Constitution*, and *Article*

X, Section 6 of the Florida Constitution. Private property shall not be taken except for a public purpose, and with full and just compensation. In addition, the taking is an arbitrary fine and unfair tax on a person injured by a tortfeasor who does not have to pay any money in excess of the punitive damages award to the State. The appellant is penalized — not the intentional tortfeasor. Furthermore, the exaction of 60% of the punitive damages award does not bear a rational or reasonable relationship to a legitimate State objective. *Belk-James, Inc. v. Nuzum*, 358 So.2d 174 (Fla. 1978).

The State further argues that the Appellant's reliance on *McBride v. General Motors Corp.*, 737 F.Supp. 1563 (M.D. Ga. 1990), finding the punitive damages provision of the Georgia Tort Reform Act unconstitutional, is misplaced. K-MART does not mention the *McBride* case at all. Although we can concede that Florida's Statute and Georgia's Statute might have some differences, i.e., Georgia exacted 75% of the punitive damages award less a proportionate part of the cost of litigation, including reasonable attorney's fees, as compared to Florida's exaction of 60% of the award, without any allowance for fees and costs, *both* States are in the United States. Both States are subject to the Constitutional provisions of the Fifth, Seventh, Eighth, and Fourteenth Amendments to the Constitution of the United States.

The *McBride* court found that the Georgia Tort Reform Act which arbitrarily and discriminatorily deprived a tort victim of the right to recover punitive damages, an element of damages which has been so long and universally recognized, was unconstitutional. The Georgia Act, as in the Florida Act, does not provide any *quid pro quo* to compensate the injured Plaintiff for that portion of the punitive damages award which the State of Florida is seeking to pirate away from him.

The constitutionality of *Florida Statute §768.73(2)(b)*, and *Florida Statute §768.73(4)*, was never questioned in the trial court prior to the October 9, 1990 Motion hearing. However, at the hearing, the Appellant's counsel specifically informed the trial court that Mr. Gordon would contest the constitutionality of the law with the State, if the State was permitted to intervene, or if the Final Judgment was amended. (App. 37, 38, 42, 46, 58, 59) The trial court proceeded to amend the Final Judgment without permitting the Appellant to establish the unconstitutionality of the Statutes, and the State's ability to intervene.

* * *

CONCLUSION

The trial court was in error in amending the affirmed Final Judgment after the Mandate was issued. In addition, the provisions of *Florida Statute §768.73(2)(b)*, and *Florida Statute §768.73(4)*, are unconstitutional and cannot be enforced. The Order Amending Final Judgment should be reversed with instructions to re-establish the Final Judgment of July 27, 1989.

Respectfully submitted,

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IN THE SUPREME COURT
OF FLORIDA
DISTRICT COURT OF APPEAL
THIRD DISTRICT NO.: 90-02497

CASE NO.: 78,638

HARVEY GORDON,

Petitioner,

vs.

STATE OF FLORIDA, et al.,

Respondent.

INITIAL BRIEF OF PETITIONER

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* * *

SUMMARY OF ARGUMENT

Section 768.73(2)(b) is unconstitutional and violates the Fifth and Fourteenth Amendments of the United States Constitution, and Article X, Section 6 of the Florida Constitution in taking private property for public use without full compensation paid to the Plaintiff who obtained a $512,000.00 punitive damages award and Judgment. *Section 768.73(2)(b)*, violates other constitutional rights, including the right of access to the courts to redress for injury, the inviolate right of trial by jury with the verdict free from substantial impairment, and the equal protection of the law.

* * *

ARGUMENT

I.

WHETHER SECTION 768.73(2)(b), FLORIDA STATUTE (SUPP. 1986), PROVIDING FOR THE STATE OF FLORIDA TO OBTAIN AND TAKE 60% OF A PUNITIVE DAMAGES AWARD IS CONSTITUTIONAL?

. . . .

Section 768.73(2)(b), has effectuated a forced taking of HARVEY GORDON'S $307,200.00 property interest in the award and judgment, and does so in a manner and degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violates the federal and state constitutional proscriptions against the taking of private property without just or any compensation.

U.S. Constitution Amendments V and XIV; Florida Constitution Article X, Section 6.[4]

. . . .

The taking clause of both the Federal and State Constitutions is, "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 at 123; 98 S.Ct. 2646 (1978). Resolving the question of "what constitutes a taking" is a problem of considerable difficulty, and courts have been unable, "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons". *Id.* at 124. When governmental regulation, "goes too far it will be recognized as a taking". *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 St. 158 (1922).

The definition of "property" is broad enough in condemnation cases to extend to intangible and incorporeal rights such as contractual rights and leasehold interests, *Pinellas County v. Brown*, 450 So.2d 240, 242 (Fla. 2d DCA 1984) and should extend to jury verdicts and awards, as well as to judgments. It has long been established in Florida that the prohibition against the taking of private property

---

[4]The Fifth Amendment to the United States Constitution provides in part:

... nor shall private property be taken for public use, without just compensation.

This amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. *Chicago, Burlington, and Quincy R.R. Co., v. Chicago*, 166 U.S. 226 17 S.Ct. 581 (1897).

. . . .

without just compensation is not limited to the taking of property under the right of eminent domain. *State Plant Board v. Smith*, 110 So.2d 401, 405 (Fla. 1959).

The right of a citizen to hold property is a valuable right and one which the sovereign should not and cannot take without compensations and due process of law. There has been no due process of law in this case since the State merely awaited the return of the jury's verdict (after two Assistant State Attorneys testified on behalf of and in aid of K-MART), the entry of a judgment including punitive damages following the verdict, failed to participate with the Plaintiff in defending against an appeal, did not contribute to the Plaintiff's costs and fees, and then only after the Final Judgment had been affirmed, decided it should intervene and take away 60% of the punitive damages award for the State — all without compensation to the Plaintiff.[6]

UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT DUE PROCESS

The determination of whether a "taking" has occurred by reason of a governmental regulation interfering with or impairing the interest of a private property owner involves essentially an "ad hoc, factual" analysis. *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S.Ct. 383 (1979). In resolving a "taking" issue, the United States Supreme Court has considered the totality of circumstances underlying the taking, including such factors as the character of the governmental action, its economic impact, and its interference with reasonable economic expectations of the

[6]The State knew about the jury verdict as it was well publicized. See Miami Herald article of July 27, 1989. (R. 21) Why did not K-MART notify the State about the jury verdict before any Judgment was entered? Because neither K-MART nor the State were interested in having the State enter into the case to assist the Plaintiff in sustaining the punitive damages award!

property owner. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035 (1980).

An additional factor, and one entitled to considerable weight, is whether the property right has ripened into a judgment. In *Ross v. Gore*, 48 So.2d 412 (Fla. 1950), a libel case, this Court held that the right to have punitive damages assessed is not property, and that until a judgment is rendered, there is no vested right in a claim for punitive damages. However, in the case at bar, a judgment *was* rendered giving GORDON a vested right in the punitive damages award. Such vested property right cannot be constitutionally abrogated or taken away without due process and full compensation. The Judgment was not void, although as we have seen, the trial court *amended* the Judgment.

. . . .

* * *

TWO OTHER STATES HAVE DECIDED THAT THEIR PUNITIVE DAMAGES SHARING STATUTES [SIC] ARE UNCONSTITUTIONAL

The District Court referred to the case of *McBride v. General Motors Corp.*, 737 F.Supp. 1563, 1578 (M.D. Ga. 1990), deciding the Georgia punitive damages sharing act unconstitutional, but ridiculed the court's discussion as "completely unpersuasive". (R. 78, footnote 9) In another footnote, the District Court referred to several other states having enacted statutes similar to Florida. (R. 75) As of this writing, two states have declared their "similar" statutes unconstitutional.

Two months ago, the Colorado Supreme Court in *Kirk v. The Denver Publishing Co.*, ____, P.2d ____, (Colo. 1991), Case No. 88SA 405, concluded that Colo. Rev. Stat. §13-21-102(4) (1987) requiring a party receiving an exemplary damages award to pay one-third of all such "damages collected ... into the state general fund" to be unconstitutional. The court held that the statute:

> "effectuates a forced taking of the judgment creditor's property interest in the judgment and does so in a manner and to a degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violates the federal and state constitutional proscriptions against the taking of private property without just compensation."

In Georgia, the United States District Court, in *McBride v. General Motors Corp.*, supra, ruled that Ga. Code Ann. §51-12-5.1(e)(2) (Suppl. 1987), was unconstitutional. Although our Third District Court of Appeal dismissed the *McBride* case and discussion as "completely unpersuasive" (Footnote 9; R. 78), the *McBride* case did find that the Georgia Tort Reform Act, through product liability punitive damage subsection conferring upon the State a *non party* judgment creditor status and entitling the State to receive 75% of the punitive damage award, violated the excessive fines provision of state and federal Constitutions. *McBride* further held that the punitive damages provision created an arbitrary and unreasonable classification between products liability tort plaintiffs and other tort plaintiffs, and that the statute authorizing the state to recover 75% of the punitive damages award was a *revenue producing* measure and unconstitutional.

. . . .

* * *

CONCLUSION

It is clear that *Section 768.73(2)(b)* is not in any way designed to promote the people's health, safety, or welfare, and bears no reasonable relationship to the Statute's avowed liability insurance purposes, and must be overturned, on constitutional due process and all of the other constitutional grounds stated herein.

. . . .

... The decision of the District Court of Appeal should be quashed with direction that on remand the trial court's Final Judgment of July 27, 1989 be reinstated.

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IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,638

FLA. SUPREME COURT

HARVEY GORDON,

Petitioner,

vs.

STATE OF FLORIDA, K-MART CORPORATION, et al.,

Respondents.

AMENDED REPLY BRIEF OF PETITIONER

On Discretionary Review From the
District Court of Appeal, Third
District Case No. 90-02497.

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* * *

ARGUMENT

I.

SECTION 768.73(2), FLORIDA STATUTES, TAKING FOR THE STATE 60% OF A PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONAL

. . . .

* * *

Section 768.73(2), is also unconstitutional by virtue of violations of the Due Process clauses of Article I, Section 9 of the Florida Constitution, and of the Fourteenth Amendment of the United States Constitution. . . .

. . . .

* * *

The injured Petitioner, HARVEY GORDON, and all other persons similarly situated, have been treated by the Legislature in a fundamentally unfair manner by the enactment of *Section 768.73(2)*, in derogation of their *substantive rights*, and the basic constitutional guarantees of due process, access to the courts, payment of just compensation when the STATE takes away 60% of the punitive damages award, the right to an inviolate jury trial by a jury with full knowledge of *Section 768.73(2), Florida Statutes*, and the equal protection of the laws.

The STATE OF FLORIDA and the Amici Curiae attempted to gloss over the two decisions rendered by other State tribunals declaring their punitive damages sharing statutes to be unconstitutional. A Georgia United States District Court decision is *Mc Bride [sic] v. General Motors*

Corp., 737 F.Supp. 1563, 1578 (M.D. Ga. 1990), found that the Georgia Statute conferring upon the State a *non-party* judgment creditor status and entitling the state to receive 75% of the punitive damages award, violated the excessive fines provision of the State and Federal Constitutions. The District Court opined that revenue was incidental, and that the Statute was arbitrary, unreasonable, and designed to restrict injured Plaintiffs of an incentive to bring actions to punish, penalize, and deter egregious business practices.

In *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), the Colorado Supreme Court decided that a Colorado Statute requiring a party receiving an exemplary damages award to pay one-third of the award into the State General Fund effected an unconstitutional taking of private property without just compensation. The Statute did not qualify as a valid penalty or forfeiture, an ad valorem property tax, an excise tax, or a user fee. Further, the Statute required the General Fund payment without conferring on the judgment creditor any benefit or service not furnished to other civil litigants who were not required to make the same payment.

. . . .

* * *

III.

SECTION 768.73(4), FLORIDA STATUTES LIMITING THE PLAINTIFF'S ATTORNEY'S FEES TO BE CALCULATED ONLY ON THE 40% PORTION OF THE PUNITIVE DAMAGES AWARD AND NOT TO BE PAYABLE FROM THE STATE'S 60% SHARE, IS UNCONSTITUTIONAL

. . . .

* * *

The denial of an attorney's fee on $307,200.00 (60% of the $512,000.00 punitive damages award), is a fine on the attorney, and is an excessive fine in violation of the Excessive Fines Clause of the *United States Constitution*, and Section 17 of the Declaration of Rights of the Florida Constitution.

In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, U.S. 237, 109 S.Ct. 2909, 106 L.Ed.2d 919 (1988), the Supreme Court held that the Eighth Amendment's excessive-fines clause was not applicable to punitive damage awards in civil cases where the government "*neither has prosecuted the action nor has any right to receive a share of the damages awarded*". *Ibid* at 2914. The Supreme Court left open the question of whether punitive damages are subject to the excessive fines limitations when a state government, as in this case, shares in the recovery. Now that the STATE OF FLORIDA has a statutory right to receive a 60% share of the punitive damages awarded, the Excessive-fines Clause is applicable. The Plaintiff's attorney is the one who is paying or suffering the excessive-fine. The Legislature cannot arbitrarily and discriminatorily deprive the attorney (or his client) of his right to his fee, by excessively fining him 40% or 45% of $307,200.00.

CONCLUSION

An award of punitive damages is a substantive right. The original Judgment was a property right. *Section 768.73(2), Florida Statutes*, has unconstitutionally taken away, without full compensation, the Petitioner's substantive and property right.

. . . .

WHEREFORE, the decision of the Third District Court of Appeal should be disapproved, the Order Amending Final Judgment entered on October 9, 1990, be reversed, and the original Final Judgment of July 27, 1989 be reinstated consistent with the Jury verdict and the Constitution of the United States of America and the State of Florida.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 10 1993
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No. 92-1328

IN THE

Supreme Court of the United States

October Term, 1992

HARVEY GORDON,

Petitioner,

v.

STATE OF FLORIDA, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

Respondents restate the questions presented as follows:

1. WHETHER § 768.73(2)(b), FLA.STAT. (1991) REQUIRING SIXTY PERCENT (60%) OF ANY AWARD FOR PUNITIVE DAMAGES BE MADE PAYABLE TO EITHER THE STATE GENERAL REVENUE FUND OR THE PUBLIC MEDICAL ASSISTANCE TRUST FUND CONSTITUTES A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE TAKING CLAUSE OF THE FIFTH AMENDMENT?

2. WHETHER § 768.73(2)(b), FLA.STAT. (1991), VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT?

3. WHETHER § 768.73(2)(b), FLA.STAT. (1991), CONSTITUTES A DEPRIVATION OF A CLAIMANT'S PROPERTY WITHOUT SUBSTANTIVE DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT?

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1. WHETHER § 768.73(2)(b), FLA.STAT. (1991) REQUIRING SIXTY PERCENT (60%) OF ANY AWARD FOR PUNITIVE DAMAGES BE MADE PAYABLE TO EITHER THE STATE GENERAL REVENUE FUND OR THE PUBLIC MEDICAL ASSISTANCE TRUST FUND CONSTITUTES A TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE TAKING CLAUSE OF THE FIFTH AMENDMENT?

2. WHETHER § 768.73(2)(b)), FLA.STAT. (1991), VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT?

3. WHETHER § 768.73(2)(b), FLA.STAT. (1991), CONSTITUTES A DEPRIVATION OF A CLAIMANT'S PROPERTY WITHOUT SUBSTANTIVE DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT?

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STATEMENT OF THE CASE

Petitioner's statement of the procedural history of this case is essentially accurate. Respondent disagrees, however, with the inappropriate characterization by Petitioner in his first paragraph of what this case illustrates, paradigmatically or otherwise. Punitive damages are dependent upon the legislative largesse of the State and serve certain societal values which have nothing to do with compensating injured tort claimants. The fact that under Florida law plaintiffs and their lawyers may have somewhat less incentive to seek such damages may itself serve certain social interests, may be a point lost on Petitioner. In any case, the fact that Petitioner is no longer happy with the size of the carrot is entirely irrelevant to an appropriate statement of the case.

SUMMARY OF ARGUMENT

Review of the decision of the Florida Supreme Court is unwarranted because under Florida law there is no property interest in punitive damages, and therefore no federal Constitutional provision is violated by a state statute which permits a tort claimant to receive only a portion of such damages imposed against a tortfeasor in the appropriate case. Petitioner continues to misapprehend the fundamental nature of the punitive damage "sharing" statue by characterizing the law as requiring "an injured Florida tort claimant to pay to the state 60% of any award for punitive damages recovered by him...." (Petition at 8). It is Florida law that permits the imposition of the punitive penalty under certain circumstances. The "sharing" the State permits with a plaintiff still provides an incentive to the plaintiff for seeking to further the social policy of punishing egregious misconduct. It may also provide a disincentive for suits that are predicated largely upon the hope of recovering punitive damages. In any event, the injured tort claimant does not pay the punitive award, the Defendant does. The fact that Petitioner is not happy with his share of the punitive award is entirely irrelevant to any constitutional concerns.

In this case, the trial judge, after appeal on other issues, properly amended the final judgment to make sixty percent (60%) of the punitive damage award payable to the State General Revenue Fund as required by Section 768.73(2)(b), Fla.Stat. (1991). This statute was in effect prior to the accrual of Petitioner's cause of action on the underlying tort claim. The trial judge acknowledged in her order that it was her mistake not to have so provided in the original final judgment. Florida decisional law recognizes that a final judgment may be properly amended after an appellate mandate has been issued, and the appellate courts of

Florida have also recognized that leave of the appellate court is not necessary where the amendment is properly made pursuant to Rule 1.540(b), Fla.R.Civ.P. The motion to amend was timely, as it was made within one year of the post-trial orders entered by the trial court. Further, under Florida law, punitive damages may be entirely abolished by the Legislature without constitutional implications.

The provisions of Section 768.73(2), Fla.Stat. (1991), do not constitute an unlawful taking of any of Petitioner's property, as he never owned the punitive damage award in question. This is the heart of Petitioner's misunderstanding. The statute was amended prior to the accrual of Petitioner's cause of action. The fact that the trial judge mistakenly did not enter the original final judgment in accordance with the law does not bestow a property right upon Petitioner, and the trial judge is not precluded from correcting that mistake by amending the final judgment. Nor is any federal Constitutional provision implicated by this action.

Punitive damages under Florida law are subject to legislative direction and control. Prior to the accrual of Petitioner's cause of action, the Florida Legislature enacted a tort reform act which changed the amounts and percentage a claimant is entitled to receive in a civil action. The Petitioner undertook this case with the statute as the controlling law. Petitioner never had a right to receive more than forty percent (40%) of the punitive damage award. His claim is therefore flawed in its premise and disingenuous in arguing that because final judgment for the entire punitive damage award was erroneously entered in his favor he was thereby vested with a property right of constitutional dimensions. Unless this Court is prepared to conclude that all citizens have a federal constitutional right to punitive damages with which the states may not interfere, the Petition should be denied.

ARGUMENT

I.

SECTION 768.73(2), FLA.STAT. (1991), REQUIRING SIXTY (60%) PERCENT OF ANY PUNITIVE DAMAGE AWARD BE MADE PAYABLE TO A STATE FUND DOES NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY.

Petitioner appears to be continuing to assert a property taking because a final judgment for the entire amount of the punitive damage award was erroneously entered by the trial court in his favor. The Third District Court of Appeal in *Gordon v. State,* 585 So.2d 1033 (Fla. 3d DCA 1991) disposed of this contention as follows:

> We relegate to a footnote the claim that Gordon obtained a constitutionally vested right to 100% of the punitive damages when the initial judgment for that amount was entered in his favor. Because the judgment was obviously erroneously entered as in contravention of a contrary statute, this contention is equivalent to stating that no judgment may constitutionally be corrected or reversed on appeal.

Id. at 1037.

The Florida Supreme Court in a per curiam decision upheld the District Court of Appeal's decision in this case. *Gordon v. State,* 608 So.2d 800 (Fla. 1992). Because the Florida decision turned on a determination of what constitutes a property interest under Florida law, no federal constitutional issue is implicated.

As to a more generalized due process property argument regarding an inchoate claim for punitive damages, the Florida courts properly concluded that as long as the statute was applied in a prospective manner no property interest was infringed. The Florida Third District Court of Appeal concluded as follows:

> The appellant's first claim that the statute constitutes an unconstitutional "taking" of a property right without due process — is wholly without merit. This is true simply because he has no cognizable, protectable right to the recovery of punitive damages at all. Unlike the right to compensatory damages...[citations omitted], the allowance of punitive damages is based entirely upon considerations of public policy. Accordingly, it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policy-maker under our system, the legislature.

585 So.2d at 1035, *affirmed,* 608 So.2d at 801.

Petitioner's argument is nothing more than a naked assertion of what he thinks he should receive under the law. As he states, "Gordon had a reasonable economic expectation to receive the fruits of the entire judgment...." (Petition at 16). Petitioner's disagreement with a discretionary legislative decree is not elevated to a protected constitutional interest because he feels he had a "reasonable economic expectation." The statute was in effect even prior to the accrual of his cause of action. From what source does his "economic expectation" spring? Petitioner's argument is totally frivolous.

II.

THE EIGHTH AMENDMENT HAS NO APPLICATION IN THIS CASE.

Petitioner's Eighth Amendment argument is again based upon a faulty premise. Only if Petitioner had a property interest which the government then exacted would an excessive fines analysis have ever potential application. A tort defendant having a punitive damage award imposed against him in a jurisdiction recognizing state sharing potentially might have an Excessive Fines Clause argument, although that issue was not adjudicated. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2902, 492 U.S. 257 (1989). Petitioner has no standing to make such an argument. Petitioner's Eighth Amendment argument is without merit.

III.

FLORIDA PUNITIVE DAMAGES STATUTE BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE LEGISLATIVE INTEREST.

Petitioner concludes his constitutional trilogy with a substantive Due Process Claim. The standard for evaluating substantive due process challenges to social and economic legislation is virtually identical to the "rational relationship" test for evaluating equal protection claims. Legislation such as is involved in this case will be upheld against a substantive due process attack unless the legislation "manifests a patently arbitrary classification, utterly lacking in rational justification." *Flemming v. Nestor,* 363 U.S. 603, 611 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435 (1960). As with the "rational relationship" test, any plausible reason supporting Congress' action in enacting the suspect legislation satisfies the "rational basis" test. *Id.* at 612, 80 S.Ct. at 1373.

With regard to the statute under attack herein, the Florida Supreme Court concluded:

> We agree with the trial court (sic) that no substantive due process violation occurred. The statute under attack here bears a rational-relationship to legitimate legislative objectives: to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney.

608 So.2d at 802.

Petitioner contends that allowing the State a share of the punitive damage award does not rationally promote the State's asserted interest in deterring future harm to the public. (Petitioner at 18). However, he fails to explain how a wrongdoer who has had to pay a punitive damage award is any less deterred if a portion of the award goes to the State instead of the plaintiff. See, for example, the concurring opinion of Justice Shores in *Fuller v. Preferred Risk Life Insurance Co.*, 577 So.2d 878 (Ala. 1991). In responding to the criticism that punitive damages awards sometimes amount to an undeserved windfall to a plaintiff, Justice Shores concluded that "directing the defendant to pay a part of a punitive damages award to the State general fund or any special fund devoted to the furtherance of justice on behalf of all the people...in proper cases could serve the purpose for which punitive damages were authorized to a greater degree than would allowing the plaintiff to receive the entire amount." *Id.* at 887. The remainder of Petitioner's speculation as to why the statute is not rationally related to the proper legislative goals enumerated by the Florida courts consists entirely of self-serving conclusions about the motivational effect of the statute on human nature and is unsupported by logic or any empirical data. And even if

Petitioner's argument made any sense, the statute would still not be utterly lacking in a rational justification so as to warrant this Court's review. The fact that the state legislature's action is fairly debatable as to whether such social legislation will have the intended result does not result in a conclusion that the statute "manifests a patently arbitrary classification."

One further remark may assist the Court in making its review decision in this case. Petitioner raises the specter of interstate conflict on a federal question by citation to the Colorado Supreme Court's decision in *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991). A careful review of the *Kirk* decision assists in understanding why the Florida Supreme Court's interpretation of the punitive damages statute is constitutionally correct and why there is no conflict on a federal question. The Florida Supreme Court concluded that there is no property right to the recovery of punitive damages. The Florida Statute requires that the state and the claimant's interest in the punitive damage award vest simultaneously, that is, upon entry of the final judgment. Thus, the state deprives the claimant of no property, rather it shares the entitlement to such an award. The language of the Florida Statute is susceptible to this interpretation and is consistent with the rule of statutory construction that a law should be construed in a manner that is consistent with its constitutionality.

The Colorado Supreme Court interpreted its statute differently. That Court construed the language of the Colorado statute as allowing vesting of a property right in a claimant which the State then divests in a constitutionally impermissible manner. Thus, the distinction between the two states' decisions lies in the conclusory premise of whether a property interest vests in a claimant or not. This alternative interpretation was ably explicated by Chief Justice Rovira in the Colorado decision. *Id.* at 273-276. The Colorado Chief

Justice pointed out how the Colorado statue could be constitutionally construed. In any case, the Colorado Legislature could permissibly rewrite the Colorado statute to comport with constitutional concerns. Thus, the Colorado decision provides Petitioner with no solace, and there is no federal question conflict between these two state court decisions.

CONCLUSION

The Florida Supreme Court's decision in *Gordon v. State, et al.*, examined the nature of an inchoate claim to punitive damages and concluded that § 768.73(2), Fla.Stat. (1991), applied prospectively, as it was in this case, does not infringe on any property interests under Florida law. Accordingly, no constitutional property right of Petitioner was violated, nor was the Excessive Fines Clause of the Eighth Amendment implicated. The Florida Supreme Court further concluded that the statute furthered legitimate legislative objectives, and therefore was not constitutionally infirm. Petitioner has failed to demonstrate any sound reason why this Court should exercise its discretionary review authority. Under these circumstances, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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In The

Supreme Court of the United States

October Term, 1992

HARVEY GORDON,

Petitioner,

v.

STATE OF FLORIDA, K-MART CORPORATION, DAVID SPARROCK, and PETER MIRAMBEAU,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. FLORIDA'S 60% "TAKE", WITHOUT COMPENSATION, IS A VIOLATION OF THE FIFTH AMENDMENT

In its Respondent's Brief, the State of Florida (hereinafter "Florida" or "the State") argues that review of the decision of the Florida Supreme Court in *Gordon v. State*, 608 So. 2d 800 (Fla. 1992) is "unwarranted" because "under Florida law there is no property interest in punitive damages" (Respondent's Brief at 2). Florida essentially reasons that, since "punitive damages may be entirely abolished by the legislature without constitutional implications" (Respondent's Brief at 3), the State may condition an injured tort claimant's use of its courts to recover punitive damages upon the payment into the State's coffers of 60% of any enforceable award or judgment recovered, even though the entire award would otherwise have become the private property of the tort claimant.

Florida's argument contains two fatal flaws. First, Florida ignores the fundamental distinction between its acknowledged power and prerogative, by statutory enactment or judicial pronouncement, to define and redefine the scope and extent of private property rights and its asserted power, by *ipse dixit*, to redefine a private property right so as to give the State or its designate a supramajority ownership interest in such right. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1990), Florida might constitutionally have chosen to limit the amount of interest that could be earned on interpleader funds while on deposit in the registry of the county court by enacting a statute lowering the legal rate of interest. Similarly, Florida could have directed that all interpleader funds, while in the registry of the county court, be deposited in noninterest-bearing accounts. Indeed, this Court in *Webb's* "accept[ed] the proposition . . . that, apart from statute, Florida law does not

require that interest be earned on a registry deposit." *Id.* at 161.

On the other hand, this Court concluded in *Webb's* that, even though Florida could have repealed the statute permitting interest to be earned on a registry deposit, Florida could not give either itself or its counties ownership of the interest so earned. Thus, the Court reasoned as follows:

> To be sure, [*Fla.Stat.Ann.*] § 28.33 establishes as a matter of Florida law that interest is to be earned on deposited funds. *But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.*

Id. at 162 (emphasis added).

In the case at bar, Florida admittedly could have restricted or even entirely abolished the recovery of punitive damages in civil actions for intentional torts. Florida, however, did not choose to do this. Rather, Florida is again attempting, by *ipse dixit*, to assume an ownership interest in a private property right and thereby transform private property into public property without the payment of just compensation. And, just as in *Webb's Fabulous Pharmacies*,[1] Florida once again trots out the flawed proposition that it may take all or part of the private property interest created by its law (*See* Respondent's Brief at 2 ("[i]t is Florida law that permits the imposition of the punitive penalty under certain circumstances")).

The other basic flaw in Florida's argument is its misleading assertion that "under Florida law there is no property interest in punitive damages" (Respondent's Brief at 2). This is not the law of Florida. In *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950), the Florida Supreme Court set forth the true rule:

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[1] Not surprisingly, Florida nowhere addresses or attempts to distinguish *Webb's* in its Respondent's Brief. *Webb's* was cited in page 13 of Petitioner's Petition for Writ of Certiorari.

> The right to have punitive damages assessed is not property; and it is the general rule that, *until a judgment is rendered,* there is no vested right in a claim for punitive damages.

Id. at 414 (emphasis added and citations omitted). Thus, under Florida law, a tort claimant obtains a property interest in punitive damages upon the entry of a judgment.

Indeed, Florida takes the position that *Fla. Stat. Ann.* § 768.73(2)(b) "requires that the state and the claimant's interest in the punitive damage award vest simultaneously, *that is, upon entry of the final judgment*" (Respondent's Brief at 8) (emphasis added). In other words, Florida impliedly concedes that in the absence of *F.S.A.* § 768.73(2)(b), Mr. Gordon would have obtained a vested property right under Florida law to 100% of the enforceable punitive damages "award" or judgment.

In fact, Florida did not assert its right to payment of 60% of the punitive damages award until after a judgment for the entire amount of the punitive damages assessed by the jury had been entered by the trial court (A-1), and Gordon had obtained thereby a vested property right in the award (A-23). The Judgment was affirmed on appeal. *K-Mart Corp. v. Gordon,* 565 So. 2d 834 (Fla. 3d DCA 1990) It makes no difference that the "entire amount of the punitive damage award was erroneously entered by the trial court in [Gordon's] favor" (Respondent's Brief at 4) since any such error or mistake stemmed from the operation of the statute itself. At the time the original judgment was entered on July 27, 1989, the statute neither made the State a party to the litigation, nor designated the State a judgment creditor, nor provided any prejudgment procedure or mechanism for implementing § 768.73(2)(b). The only viable mechanism for asserting the State's statutory entitlement to 60% of the award was a postjudgment motion.

Florida baldly asserts that § 768.73(2)(b) does not constitute a taking because Mr. Gordon "never owned the punitive damage award in question" (Respondent's Brief at 3). This assertion is akin to the discredited reasoning of the Florida Supreme Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra,* that " 'there is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property.' " 449 U.S. at 158-59 (quoting *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 952-53 (Fla. 1979), *rev.'d*, 449 U.S. 155 (1980)). Mr. Gordon purportedly did not become the owner of 100% of the punitive damages "award" or judgment only because Florida enacted a statute that, merely by the State's own say-so, transformed 60% of any such award or judgment into public property. By arbitrarily staking out an "entitlement" (Respondent's Brief at 8) to a supra-majority ownership interest in any enforceable award or judgment for punitive damages recovered by an injured tort claimant, the statute exacts a "forced contribution to government revenues" that "is not reasonably related to the costs of using the courts." 449 U.S. at 163. The statute thereby takes Mr. Gordon's and other injured tort claimants' private property without just compensation.

Florida similarly argues that, in view of the enactment of § 768.73(2)(b), Mr. Gordon "never had a right to receive more than forty percent (40%) of the punitive damage award" (Respondent's Brief at 3) even though Gordon contributed 100% of the time, money, and effort that went into recovering the award. Just as Florida did not contribute any of the principal that generated the interest earned in *Webb's Fabulous Pharmacies,* the State here contributed nothing toward the cost of prosecuting Gordon's claim for punitive damages. Nor may Florida accomplish the grabbing away of the lion's share of the punitive damages award or judgment by, in effect, recharacterizing Gordon's private expenditure of time, money and effort in pursuit of his claim for punitive

damages as a "public" prosecution "to further the social policy of punishing egregious misconduct" (Respondent's Brief at 2). See *Webb's Fabulous Pharmacies, Inc. v. Beckwith, supra,* 449 U.S. at 164. Furthermore, Gordon's attorney did not volunteer to serve the State as an unpaid Special Attorney General and obtain a windfall for the State without receiving a *quid pro quo.*

With respect to the remark that "the injured tort claimant does not pay the punitive award, the Defendant does" (Respondent's Brief at 2), Florida fails to recognize that an injured tort claimant pays with his or her own time, energy, motivation, money, attorney's services, and effort to prosecute to a successful conclusion a claim for punitive damages. A claim for which the State has not prosecuted against the Defendant in the criminal courts. The recovery of an enforceable award or judgment for punitive damages represents the fruit of that time, effort, and expense. Florida, on the other hand, does not pay one penny or devote one minute of an assistant attorney general's time toward the recovery of punitive damages awards in private civil suits. Yet, by statute, it claims the lion's share of the fruits of the injured tort claimant's efforts. Not only is Mr. Gordon "no longer happy with the size of the carrot" (Respondent's Brief at 1) left after Florida takes its huge 60% bite,[2] he is equally unhappy with a freeloading State, much like Peter Rabbit, swallowing most of the carrot without even reimbursing Gordon

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[2] Even the Florida legislature evidently had second thoughts about the size of this bite as it later amended *F.S.A.* § 768.73(2)(b) to reduce the share of punitive damages payable to the State from 60% to 35%. 1992 *Fla. Laws* ch. 92-85, § 2 (effective Apr. 8, 1992). The Florida legislature apparently agreed that 60% was "too great a take" "by any standard of excessiveness" and therefore constituted an unconstitutional taking. *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989).

for a proportionate share of the time, money, and effort that Gordon invested in growing it.[3]

This Court need not conclude that "all citizens have a federal constitutional right to punitive damages" (Respondent's Brief at 3) in order to grant the Petition. All the Court need find is that Florida has arrogated to itself, without paying any compensation, a 60% ownership interest in an enforceable award or judgment for punitive damages that, under Florida law, would otherwise be or become the property of the injured tort claimant.

II. THE EIGHTH AMENDMENT DOES APPLY AND IS VIOLATED WHEN THE STATE FINES, SEIZES AND EXTORTS 60% OF THE PUNITIVE DAMAGES AWARD

Florida argues that "an excessive fines analysis" has no application here because Mr. Gordon did not have a property interest in the award or judgment for punitive damages (Respondent's Brief at 6). In fact, Gordon obtained a vested property right when the circuit court

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[3] The State argues that there is no "federal question conflict" between the Florida Supreme Court's decision in *Gordon v. State, supra,* and *Kirk v. Denver Publishing Co.*, 818 P.2d 262 (Colo. 1991), because a property interest vested in *Kirk* while in *Gordon* it did not (Respondent's Brief at 8-9). Florida fails to acknowledge that a property interest in the entire punitive damages award vested when the circuit court entered a judgment in Gordon's favor for the full amount of the award (A-1, A-23).

In addition, Chief Justice Rovira's dissenting opinion in *Kirk v. Denver, supra,* rests on the faulty premise that, as the State may completely eliminate punitive damages in civil cases, it likewise has the power to condition a statutory grant of authority to recover such damages upon the State's obtaining a substantial ownership interest in the judgment. 818 P.2d at 273-76. This premise, that the State may take all or part of what it permits to be created, was condemned by this Court in *Webb's Fabulous Pharmacies.*

entered a Final Judgment for the entire amount of the punitive damages award in Gordon's favor (A-1, A-23). The Judgment was affirmed on appeal. *K-Mart Corp. v. Gordon*, 565 So. 2d 834 (Fla. 3d DCA 1990). Thereafter, the State extracted 60% of the $512,000.00 punitive damages portion of the Judgment solely for the purpose of raising revenue and in effect, punishing or fining Mr. Gordon.

Even under Florida's view, the State extracted 60% of a punitive damages award that would have otherwise become the vested property right of Mr. Gordon in its entirety. The practical effect of the extraction is the same regardless of whether the forfeiture so imposed is viewed as divesting an already vested property right or is viewed as wrongfully preventing a property right from vesting in the injured tort claimant. In either case, Florida is using the civil courts, not the criminal courts, to extract large forfeiture/payments for the purpose of raising revenue, thus squarely presenting the issue reserved for future decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelso Disposal, Inc.*, 492 U.S. 257, 275 (1989). Mr. Gordon, as the injured tort claimant whose punitive damages award was arbitrarily reduced to 40% of its original $512,000.00 by Florida's imposition of this excessive fine and forfeiture, clearly has standing to raise this Eighth Amendment issue.

Florida admits in page 6 of its Brief, that a tort defendant having a punitive damages award imposed against him in a jurisdiction recognizing "state sharing" might have an Excessive Fines clause argument and cites *Browning-Ferris*. Therefore it would logically follow that the injured tort claimant having a punitive damages award imposed in his or her favor in a jurisdiction recognizing and imposing "state sharing", would also have an Excessive Fines argument. In the final analysis, the person who suffers the most by the "state sharing" of 60% as in Florida or 75% as in Georgia, is the suffering and damaged claimant. The wrongdoer does not pay any more and has caused more harm to the injured Mr., Ms.,

or Mrs. Gordons in Florida and seven other "state sharing" states.

III. FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAUSE HAS BEEN VIOLATED

Florida argues that Gordon "fails to explain how a wrongdoer who has to pay a punitive damage award is any less deterred if a portion of the award goes to the State instead of to the Plaintiff" (Respondent's Brief at 7). The State, however, fails itself to explain how a wrongdoer who has to pay a punitive damages award is any *more* deterred if a portion of the award is confiscated by the State. Indeed, most wrongdoers will reap a benefit from the State's confiscation of a large part of the punitive damages awards entered against them since most wrongdoers are taxpayers and residents of the State whose taxes will be lowered or public services increased from the forced diversion of large portions of civil punitive damages awards to the State General Revenue Fund.

As for the comments taken from the concurring opinion of Justice Shores in *Fuller v. Preferred Risk Life-Insurance Co.*, 577 So. 2d 878 (Ala. 1991), Justice Shores failed to address the constitutional implications of his suggestion of selective, court-ordered confiscation of punitive damages awards. Regardless of whether such confiscation would serve some public purpose, a State may not take the well-deserved fruits of a private party's time, money, and labor without paying that party just compensation.[4] Moreover, none of the Florida courts in this case

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[4] Interestingly enough, Justice Shores does recognize that the plaintiff's attorney fees should be based upon the total verdict, and not the reduced amount paid to the plaintiff, *since it is due to the [plaintiff's] attorney's efforts that the public interest has been served.*

Id. at 887 (emphasis added). Indeed, most of the punitive damages "sharing" statutes that have been enacted, unlike *F.S.A.*

made a judicial finding that Mr. Gordon, who was falsely imprisoned and battered by employees of K-Mart Corporation, would have received an "undeserved windfall" if he had been allowed to retain the entire amount of the punitive damages award. *See id.* at 886 wherein Justice Shores stated that "*sometimes* an award does constitute an undeserved windfall to the plaintiff" (emphasis added).[5] This is clearly not a "proper case," *id.* at 887, for a selective reduction of the plaintiff's punitive damages recovery. The only "undeserved windfall" in this case is that being reaped by Florida in confiscating, 60% of the award while paying 0% of the attorney's fees and litigation expenses.

The State of Florida was not a party to the litigation nor did the offending statute § 768.73(2)(b) grant Florida the status of a judgment creditor. The jury cannot even be instructed or informed that the State is to receive any part of the punitive damages award. Fla. Stat. Ann. § 768.73(5).

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§ 768.73(2)(b), provide for the deduction of attorney's fees and/or costs or expenses *before* a stated percentage share of the punitive damages award is directed to be paid into the state treasury, general revenue fund, or other public fund. *Ga. Code Ann.* § 51-12-5.1(e)(2); *Mo. Ann. Stat.* § 537.675; *Or. Rev. Stat.* § 18.540(1)(c); *Utah Code Ann.* § 78-18-1(3).

[5] The plantiff insured in *Fuller,* who sued the defendant insurer for breach of contract and fraud based upon her insurer's refusal to pay certain claims made on her health and hospitalization insurance, recovered a punitive damages award of $1 million even though she only sought a total of $250,000 in both compensatory and punitive damages in her complaint.

CONCLUSION

In view of the reasons and authorities set forth above, as well as in the Petition for Writ of Certiorari, Petitioner Harvey Gordon urges this Court to issue a Writ of Certiorari, invalidate as unconstitutional the Florida punitive damages taking/sharing statute, Fla. Stat. Ann. § 768.73(2)(b), and remand this matter to the Florida Supreme Court with directions to reinstate the trial court's Final Judgment of July 27, 1989, and to order the State of Florida to return the 60% "take" plus accrued interest to the Petitioner.

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